No. 08-

IN THE
Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY *et al.*,
Petitioners,

v.

TOM LUNDEEN *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 8, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether, consistent with *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) and related cases, Congress can overturn a final federal court of appeals judgment simply because other claims not addressed by that judgment remain pending on remand from the initial decision; and

2. Whether, consistent with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) and related cases, Congress can employ a "clarification amendment" to direct a federal court to set aside prior statutory interpretation (including by this Court) to reach a particular, different result in a pending case.

PARTIES TO THE PROCEEDINGS

Petitioners are Canadian Pacific Railway Company, Canadian Pacific Railway Limited, and Soo Line Railroad Company. Canadian Pacific Railway Company is a wholly-owned subsidiary of Canadian Pacific Railway Limited; Soo Line Railroad Company is an indirect wholly-owned subsidiary of Canadian Pacific Railway Company. No other publicly held corporation owns 10% or more of any petitioner.

Respondents are Tom and Nanette Lundeen, individually and on behalf of M.L. and M.L., minors; Melissa Todd; Mary Beth Gross, individually and on behalf of B.G., a minor; Mark and Sandra Nesbit; Ray Lakoduk; JoAnn Flick; Bobby and Mary Smith; Leo Gleason; Denise Duchsherer and Leo Duchsherer; Larry and Carol Crabbe; and Rachelle Todosichuk.

The United States of America intervened in the court of appeals in support of respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ("Canadian Pacific") respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel's decision below is reported at 532 F.3d 682 and is reproduced at Pet. App. 1a-41a. The Eighth Circuit's order denying panel and *en banc* rehearing (and Judge Beam's dissent) is unreported and is reproduced at Pet. App. 42a-60a. The district court's decision from which this appeal was brought is reported at 507 F. Supp. 2d 1006 and is reproduced at Pet. App. 81a-102a.

The Eighth Circuit's earlier decision in this case (holding negligent track inspection claims to be completely preempted) is reported at 447 F.3d 606 and is reproduced at Pet. App. 61a-78a. The Eighth Circuit denied panel and *en banc* rehearing of that decision in an unreported order that is reproduced at Pet. App. 79a. This Court's order denying respondents' petition for certiorari from that decision is reported at 127 S. Ct. 1149 and is reproduced at Pet. App. 80a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008, and rehearing was denied on October 10, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Railroad Safety Act of 1970 ("FRSA"), as amended, are reprinted at Pet. App. 103a-104a.

INTRODUCTION

Dissenting from the panel's decision in this case and the Eighth Circuit's denial of rehearing, Judge Beam stated that the court of appeals' holding "presents an insurmountable separation of powers problem" and expressed his "hope that the Supreme Court may find it appropriate to consider the untoward ramifications of this decision, assuming [Canadian Pacific] requests it to do so." Pet. App. 39a, 60a. Canadian Pacific now makes just that request. The panel majority read an eleventh-hour "clarification amendment" enacted by Congress and directed to this very case as requiring the court to reopen and set aside a prior decision that had been fully and finally litigated, to reinstate state law claims found to be completely preempted in that final decision, and to strip the court of federal jurisdiction over other pending claims. The decision below is contrary to this Court's decisions in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and conflicts with numerous decisions from other circuits faithfully applying those precedents in analogous contexts. A writ of certiorari should be granted.

STATEMENT OF THE CASE

On January 18, 2002, a Canadian Pacific train derailed near Minot, North Dakota and released a dangerous chemical, anhydrous ammonia, from several tank cars.

Hundreds of Minot residents, including respondents, filed negligence claims in Minnesota state court, seeking to recover personal injury and property damages. Canadian Pacific removed respondents' lawsuits to the United States District Court for the District of Minnesota, which remanded the cases to state court after first allowing respondents to amend their complaints to excise their express federal claims.

Canadian Pacific appealed to the Eighth Circuit, which reversed. *Lundeen* v. *Canadian Pac. Ry.*, 447 F.3d 606 (8th Cir. 2006) ("*Lundeen I*"), Pet. App. 61a-78a. The circuit court held that the Federal Railroad Safety Act of 1970 ("FRSA"), as amended, and the Act's implementing regulations completely preempted respondents' state law claim for negligent track inspection. *Id.* at 76a-78a.

FRSA establishes federal regulation of railroads and broadly preempts state law, including common law causes of action. The Secretary of Transportation "shall prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). FRSA's preemption provision mandates that regulation "related to railroad safety . . . shall be nationally uniform to the extent practicable," subject to a narrow savings provision for state regulation that is "necessary" to address a "local safety or security hazard," but only to the extent such state law is not "incompatible" with federal regulation or a burden upon interstate commerce. *Id.* § 20106.[1]

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[1] This Court construed § 20106 to preempt state causes of action addressing "the same subject matter" as that "cover[ed]" by federal regulations and not within the scope of the savings provision. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664-65 (1993); *see also Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000).

After canvassing the federal regulations addressing track inspections, the Eighth Circuit applied § 20106 and concluded that the regulations completely preempted respondents' negligent track inspection cause of action. Pet. App. 73a-78a. Federal jurisdiction therefore extended over respondents' claim. *Id.* at 78a.

Respondents unsuccessfully sought rehearing and rehearing *en banc*, see Pet. App. 79a, and thereafter the Eighth Circuit's mandate issued. Respondents then petitioned this Court for certiorari, which was denied. *Id.* at 80a.

On remand, the district court held that FRSA preempted all of respondents' tort claims. The court noted that the Eighth Circuit had resolved the negligent inspection claim and, applying FRSA § 20106, held that other federal regulations preempted respondents' state law claims asserting negligent construction and maintenance, negligent hiring and supervision of personnel, and negligent operation of the train. Pet. App. 87a-96a. The court ultimately determined that federal law and regulations precluded any judicial remedy, and dismissed the complaints. *Id.* at 96a-100a.

While respondents' appeal of the district court's dismissal order was pending, Congress enacted a "clarification amendment" to § 20106 in the form of a provision attached to unrelated counterterrorism legislation. See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. Congress preserved § 20106, without alteration, as § 20106(a), and engrafted a new § 20106(b), entitled "clarification regarding State law causes of action."

Subsection 20106(b) provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party" has (i) failed to comply with "the Federal standard of care established by regulation or order . . . covering the subject matter as provided in subsection (a) of this section;" (ii) failed to comply with a plan created pursuant to federal order; or (iii) failed to comply with a state requirement that is "not inconsistent" with § 20106(a). 49 U.S.C. § 20106(b)(1). Subsection (b) applied "to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002," the date of the Minot derailment. *Id.* § 20106(b)(2). A new subsection (c) provided that "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." *Id.* § 20106(c).

The Conference Report accompanying the bill confirmed that § 20106(a) "contains the exact text of 49 U.S.C. § 20106 as it existed prior to enactment of this act" and that the preexisting provision was "restructured for clarification purposes; however, the restructuring is not intended to indicate any substantive change in the meaning of the provision." H.R. Conf. Rep. No. 110-259, at 351 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 183. The sole purpose of the legislation was to "clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent." *Id.* Floor statements confirmed that goal. See 153 Cong. Rec. H3083, H3109-10 (daily ed. Mar. 27, 2007) (statement of Rep. Oberstar) ("The bill does not change any of the current law, but only adds

to it to clarify the meaning of what is already in public law. . . . The situation needing remedy is the misinterpretation of the statute by some courts. That is precisely what this clarifying language is intended to accomplish."); *Id.* at H3109 (statements of Rep. Pomeroy) (same, and noting that the dismissal of respondents' claims was the reason for the clarification).

In a 2-to-1 decision, a panel of the Eighth Circuit applied the new provisions to the pending appeal and held that federal regulations no longer preempted respondents' state law causes of action and that § 20106 no longer afforded federal subject matter jurisdiction over respondents' claims. The majority acknowledged that the new provisions of § 20106 were a "clarifying amendment," but held that § 20106(b)(1) reflected "Congress's disagreement with the manner in which the courts, including our own in *Lundeen I*, had interpreted § 20106 to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state court lawsuit." Pet. App. 10a. And even though § 20106(c) contains no effective date, the majority construed that subsection to apply retroactively to remove federal jurisdiction over respondents' claims. *Id.* at 12a-13a.

The majority rejected constitutional challenges to the retrospective application and reinterpretation of § 20106. The legislation was deemed not to be an instance "when Congress tries to apply new law to cases which have already reached a final judgment." Pet. App. 12a (citing *Plaut*, 514 U.S. 211). The separation of powers was not violated because aspects of the case were still "pending" on appeal when Congress passed the "clarifying" legislation, even

though *Lundeen I*'s complete preemption decision had been fully litigated. *Id.* at 12a-13a.

In addition, despite "Congress's reference to the amendment as a '[c]larification' of existing law rather than a substantive change to existing law," the majority concluded that the "statute's clear language indicates state law causes of action are no longer preempted under § 20106." Pet. App. 13a. In rejecting due process and equal protection challenges to the amendment's provision for retroactive application of the clarification to the exact day of the events underlying respondents' complaints, the majority held that Congress' choice of the effective date was not irrational and did not impinge upon a fundamental right—and was thus constitutional.

The panel majority concluded that the revised § 20106 "effectively overrules our decision in *Lundeen I*," and determined that "we must now enforce [§ 20106] by vacating *Lundeen I*" and "remand[ing] these cases to the district court with directions to further remand them to state court." Pet. App. 11a, 17a.

Judge Beam dissented. He argued that the majority had construed § 20106(b)(1) and (c) too broadly, with the effect of "essentially repealing subsection (a) of the amended Act and stripping federal jurisdiction from both versions of the legislation." Pet. App. 28a. He viewed § 20106(b) as a limited "clarification" intended, as the language of § 20106(b)(1) indicates, to preserve state law causes of action that asserted violations of federal standards, but also—consistent with Congress' reaffirmance of the preexisting standard in § 20106(a)—to ensure the continued preemption of state law causes of action premised on standards different from those set forth in federal regulations. Because "railroad ser-

vice . . . is entitled to be delivered free of state requirements that differ from the federal regime," and because respondents' state law claims departed from the federal standards, Judge Beam concluded that respondents' claims were preempted even under the newly clarified statutory standard. *Id.* at 35a-36a.

Judge Beam also explained that the majority erred in giving retroactive effect to the newly amended § 20106 so as to set aside *Lundeen I*. Invoking *Plaut*, he emphasized that "the jurisdictional finding [in *Lundeen I*] was a final judgment that cannot constitutionally be reopened or reversed by Congress or this court." Pet. App. 37a-38a. He agreed that § 20106(b) and (c) could bear on the case, but "only to the instant appeal—a review of Judge Rosenbaum's order of dismissal." *Id.* at 38a. Yet the panel majority had read the "clarification" (even without a substantive change in law) to require the court to reach back and undo prior decisions in the case; such a result, Judge Beam concluded, "presents an insurmountable separation of powers problem" and "is not subject to congressional disposition." *Id.* at 39a-40a.

Judge Beam expanded his analysis in his dissent from the denial of Canadian Pacific's petition for rehearing. He stressed that Rule 3 of the Federal Rules of Appellate Procedure limited appellate jurisdiction to review of the 2007 district court order dismissing respondents' remaining claims and thus barred review of "the jurisdictional issues fully and finally litigated" in *Lundeen I*. Nor could § 20106(c)'s restriction on federal question jurisdiction remove the federal courts' jurisdiction over respondents' claims, because that subsection addressed pending claims supported by diversity jurisdiction.

Judge Beam also argued that the majority's due process analysis was flawed: because § 20106(b) and (c) were a "retroactive adjustment of private burdens and benefits," which are "'generally unjust,'" the court was compelled to apply a heightened standard of review. Pet. App. 58a (citing *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring and dissenting)). Judge Beam pointed out that this Court's assessment of other jurisdiction-stripping provisions similarly called for heightened review and would invalidate any Congressional directive that courts resolve respondents' claims in a particular manner. *Id.* at 59a (citing *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008)). Judge Beam closed his dissent by expressing his "hope that the Supreme Court may find it appropriate to consider the untoward ramifications of [the panel's] decision." *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *PLAUT* AND WITH DECISIONS OF SEVERAL OTHER COURTS OF APPEALS.

The Eighth Circuit held that Congress' "clarification" of FRSA § 20106 required the court to reopen a decision confirming the existence of federal jurisdiction, which had already been fully and finally litigated (including through an unsuccessful petition for certiorari to this Court), and to reinstate state law claims that the federal judiciary had conclusively determined to be completely preempted. Compare Pet. App. 12a-13a, with *id.* at 76a-78a. That decision contravenes *Plaut* and conflicts with other circuits' applications of that precedent. The decision below creates a square conflict with the First Circuit (which reached the opposite conclusion on closely analogous

facts) and contradicts the finality principles recognized by the Fourth, Fifth, and Tenth Circuits. The Eighth Circuit has permitted Congressional interference with final judgments in a manner that *Plaut* forecloses and that would not be permitted by other courts of appeals. This Court should review that decision.

A. The decision below is contrary to *Plaut*. In *Plaut*, this Court struck down Congress' attempt to resurrect securities fraud lawsuits that federal courts had finally determined to be time-barred. Because "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," they ensured that Congress "'cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.'" *Plaut*, 514 U.S. at 219, 222 (quoting *The Federalist* No. 81, at 545 (Alexander Hamilton) (J. Cooke ed. 1961)).

The division between permissible legislation and legislation that impermissibly invades the judicial realm rests on the finality of judicial judgments. The touchstone of finality is whether a judgment can be appealed:

> [A] distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, [but] [h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very*

> *case* was something other than what the courts said it was.

Id. at 227. *Plaut*, therefore, unambiguously precludes legislative attempts to reopen judgments that are no longer subject to direct appeal.

Just as unambiguously, the decision below contravenes *Plaut*'s command by reading § 20106, as "clarified," to vacate the final judgment in *Lundeen I* and to overturn its holding that respondents' negligent track inspection claims were completely preempted, foreclosing such state causes of action.[2] The complete preemption determination in *Lundeen I* was "final" within the meaning of *Plaut*.

Lundeen I held that respondents' negligent inspection claims (asserted under North Dakota law) were completely preempted by the FRSA and that such preemptive force gave rise to federal court jurisdiction. Pet. App. 76a-78a. As this Court has recognized, a finding of complete preemption means that "there is, in short, no such thing as a state-law claim." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 11 (2003). Instead, federal law "wholly displaces the state-law cause of action," and "the exclusive cause of action for the claim asserted" must be found in federal law, if at all. *Id.* at 8. *Lundeen I* thus conclusively rejected respondents' claims for negligent inspection under state law. Respondents unsuccessfully petitioned to have this judgment reheard by the panel or by the Eighth Circuit *en banc*. Pet. App. 79a. This Court denied the petition for a writ of certiorari. *Id.* at 80a.

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[2] As Judge Beam noted in his dissent, Pet. App. 35a-36a, these constitutional concerns could be avoided by construing the statute narrowly.

Once respondents' appeals were exhausted, *Lundeen I*'s judgment concerning FRSA's displacement of state law negligent inspection claims, as well as its jurisdictional determination, became final and exempt from relitigation. *Ins. Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-25 (1931) (once a party has "had its day in court with respect to jurisdiction" and further appeal is unavailable, the "matter[ ] ... shall be considered forever settled as between the parties").[3] *Lundeen I* "bec[ame] the last word of the judicial department with regard to" complete preemption and the preclusion of a state law negligent inspection claim. *Plaut*, 514 U.S. at 227. Those judgments were final, unreviewable, and could not be relitigated. As a result, "Congress [could] not declare by retroactive legislation that the law applicable [to this case] was something other than what the courts said it was." *Id.*[4]

B. The decision below also conflicts with the decisions of other courts of appeals that have applied *Plaut* when a final decision of a court of appeals is followed by pending proceedings on remand.

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[3] Numerous circuit courts have held likewise. *See, e.g.*, *Fafel* v. *DiPaola*, 399 F.3d 403, 410 (1st Cir. 2005) (citing cases); *Bromwell* v. *Mich. Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997); *Am. Telecom Co.* v. *Republic of Leb.*, 501 F.3d 534, 539 n.1 (6th Cir.), *cert. denied*, 128 S. Ct. 1472 (2007); *Okoro* v. *Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999) (Posner, C.J.); *Kendall* v. *Overseas Dev. Corp.*, 700 F.2d 536, 537-38 (9th Cir. 1983); *Int'l Air Response* v. *United States*, 324 F.3d 1376, 1380 (Fed. Cir. 2003).

[4] *Lundeen I* was decided on May 16, 2006. The decision became the final word of the judicial department on January 22, 2007, when this Court denied the petition for certiorari. Congress enacted its § 20106 "[c]larification" on August 3, 2007.

The *Lundeen II* majority concluded that *Plaut* did not apply because the Minot lawsuits "were on appeal and had not reached final judgments" at the time Congress clarified § 20106. Pet App. 13a. In other words, because *other* claims not resolved in *Lundeen I* were "pending" when Congress acted, the court believed itself obliged to reopen the *entire* case, including the final judgment in *Lundeen I* that could no longer be appealed. *Id.* at 12a-13a, 17a-18a. This conclusion creates a significant conflict with other circuits.

Several courts of appeals have confirmed that *Plaut* applies to *judgments*, not entire cases, and thus the pendency of other aspects of a case after a final judgment is entered on a particular legal controversy does not diminish the prohibition against legislative encroachment upon that final judgment. In a procedurally similar case, the First Circuit held that Congress' attempt to "'clarif[y]'" the federal carjacking statute in response to the that court's earlier decision in the case was "legally irrelevant," even though the case had been remanded and was pending in the district court when the amendment took effect. *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998). The First Circuit concluded that, "[i]n the first appeal of this case, this court decided what Congress's intention was when it enacted the original statute;" that judgment was final and, under *Plaut*, could not be revised by "post hoc statements" in a later clarification amendment regardless of whether aspects of the case remained unresolved before the courts. *Id.*

Other circuits have likewise noted that once a discrete legal controversy is no longer subject to *direct* appeal, Congress lacks power to change the result even if collateral proceedings persist. See, *e.g.*,

United States v. *Enjady*, 134 F.3d 1427, 1429-30 (10th Cir. 1998) (under *Plaut*, a court "must give effect to [a statutory] amendment" if the enactment "is the law at the time we decide defendant's *direct* appeal" (emphasis added)); *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1041-42 (5th Cir. 1997) (*Plaut* teaches that "[a]pplication of a subsequent change in a statute or regulation to a final decision implicates concerns not present when the change occurs while the decision is pending before the initial tribunal or on *direct* appeal," even if other aspects of the case continue (emphasis added)); *Plyler* v. *Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (statute considered in *Plaut* was unconstitutional because it "required courts to reopen securities fraud cases . . . regardless of the fact that the cases were no longer pending on *direct* review" (emphasis added)).[5] As the Tenth Circuit has explained, a matter is "pending" while it is subject to direct appeal, but when "'the availability of appeal is exhausted, and the time for a petition for certiorari has elapsed or the petition has been denied,'" the judicial department has spoken and that final decision may not be legislatively altered in that case. *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215,

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[5] This conclusion is consistent with the rule applicable to intervening changes in governing precedent, which only affects matters pending on direct review at the time of the change. *See Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 92 (1993). The rationale also accords with the law governing finality determinations under 28 U.S.C. § 1257, which treats decisions on legal questions as final if "later review of the federal issue cannot be had"—even if "further proceedings on the merits in the state courts [are still] to come." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

1223 (10th Cir. 1996) (quoting *Johnston* v. *Cigna Corp.*, 14 F.3d 486, 489 n.4 (10th Cir. 1993)).[6]

Lundeen II's interpretation of *Plaut*—that a judgment is still "pending" as long as any aspect of the case remains before the federal courts—starkly conflicts with these precedents. Had this case arisen in the First Circuit, the result would surely have been different: *Vazquez-Rivera*'s holding would have required that Congress' clarification be treated as "legally irrelevant" to the ongoing, unrelated proceedings in the case. 135 F.3d at 177. The same result would follow in any of the other circuits—the Fourth, Fifth, and Tenth—that read *Plaut* to proscribe Congressional interference with final judgments no longer pending on direct appeal. Yet under the Eighth Circuit's rule, no decision or judgment can achieve finality, and Congress can force a court to reopen any prior determination, as long as any part of a "case" is still pending before the judiciary. Other circuits have, correctly, concluded otherwise.

C. The Eighth Circuit reasoned that through its "[c]larification" of § 20106, Congress disagreed with *Lundeen I* and sought to reopen and reverse that final decision. See *supra* at 5-6 (citing legislative history). But, it hardly matters that "the legislature[ ] [has a] genuine conviction . . . that the judgment was wrong." *Plaut*, 514 U.S. at 228. What controls, as other courts of appeals have concluded, is whether the particular decision that Congress seeks

[6] *See also Elramly* v. *INS*, 131 F.3d 1284, 1285 (9th Cir. 1997) (per curiam) (*Plaut* draws a "clear distinction" between judgments subject to appeal and those that are not); *Baker* v. *GTE N. Inc.*, 110 F.3d 28, 30 (7th Cir. 1997) (Easterbrook, J.) (*Plaut* forbids "the revision of a judgment that has become final," and a case is "not final [if] it was pending on appeal").

to overturn was pending on direct appeal when Congress acted. The issues decided in *Lundeen I* were not.

As Judge Beam noted in dissent, "*Lundeen I* and the prior jurisdictional rulings concerning the Lundeens' amended complaint [were] not pending" when Congress enacted the clarification; *Lundeen I* was "not a 'judgment[ ] still on appeal' in any sense contemplated by *Plaut*" or any rule of law that respects the judicial process. Pet. App. 38a-39a. Treating the *Lundeen I* judgment as subject to change by legislation "presents an insurmountable separation of powers problem." *Id.* at 39a. Judge Beam and the courts of appeals in accord are correct, and this Court's review is plainly warranted to give *Plaut* its proper due.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KLEIN* AND DEEPENS EXISTING SPLITS AMONG THE COURTS OF APPEALS REGARDING THE APPLICATION OF *KLEIN*.

Lundeen I finally resolved the issue of respondents' negligent track inspection claims; it did not address other allegations of negligence. On remand, the district court held that respondents' claims for negligent construction and maintenance of track, negligent hiring and supervision of staff, and negligent operation of the train were likewise preempted. Pet. App. 94a-96a. Respondents' appeal from these district court determinations was "pending" on direct appeal when Congress attempted to clarify the meaning of § 20106, and the *Lundeen II* majority held that the clarification required reversal of the district court's preemption conclusions. This holding conflicts with the longstanding rule—

articulated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and its progeny—that Congress may not prescribe a rule of decision for a pending case without amending substantive law. *Lundeen II* also deepens two existing circuit splits regarding the meaning of *Klein* and the effect of "clarification amendments" like 49 U.S.C. § 20106(b) and (c), and poses serious due process concerns.

A. This Court has consistently enforced the Constitution's separation of powers to preclude Congress from "invest[ing] itself or its Members with either executive power or judicial power," *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quotation marks omitted), and has held it to be "the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *United States* v. *Brown*, 381 U.S. 437, 446 (1965) (quotation marks omitted).

Beginning with *Klein*, this Court established that Congress violates the separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146. *Klein* invalidated a statute that directed courts to give particular effect to a Presidential pardon, contrary to this Court's precedents requiring a different result. *Id.* at 146-47. As this Court later explained, the principle animating *Klein* is Congress' lack of "constitutional authority to control the exercise of [this Court's] judicial power," including by requiring a lower court's judgment to be "set aside . . . by dismissing the suit." *Pope* v. *United States*, 323 U.S. 1, 8 (1944). While Congress is empowered to change substantive law so as to affect

pending cases, statutes may only "compel[ ] changes in law, not findings or results under old law." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992).

With the recent § 20106 legislation, Congress sought to achieve just this prohibited result. While disclaiming any intent to change the text or meaning of § 20106, Congress enacted a "[c]larification" that directed federal courts to alter their established interpretation of § 20106 as applied to this dispute. Compare § 20106 (pre-amendment), with § 20106(a) (same text); see Pet. App. 103a (§ 20106(b) entitled "Clarification regarding State law causes of action"); *Henning* v. *Union Pac. R.R.*, 530 F.3d 1206, 1216 (10th Cir. 2008) (§ 20106(b) was a "clarification amendment"); Pet. App. 9a-10a (same).

The Eighth Circuit in *Lundeen I* and the district court on remand had earlier construed § 20106 in accord with this Court's construction of that same provision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). The "[c]larification" of § 20106 required retroactive application of a new rule as of the exact date of the Minot derailment. Congress targeted this litigation and directed that the same "old law" now set forth in § 20106(a) be given a new judicial interpretation—one requiring reversal of an earlier final adjudication and a disavowal of already-exercised federal jurisdiction over the suit. See H.R. Conf. Rep. No. 110-259, at 351, *reprinted in* 2007 U.S.C.C.A.N. at 183 (§ 20106(b) "is not intended to indicate any substantive change in the meaning of the provision," and is intended only to "clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota

accident"); see *supra* at 5-6. And, in giving effect to this Congressional directive to alter the established meaning of § 20106's text, the Eighth Circuit in *Lundeen II* unquestionably condoned Congressional power that exceeds the limitations recognized in *Klein* and its progeny.

B. The Eighth Circuit's decision in *Lundeen II* also deepens two longstanding divisions among the courts of appeals, thus further warranting this Court's review.

1. *Lundeen II* exacerbates a split among the circuits regarding the proper application of *Klein* to legislation enacted to direct the outcome of particular, ongoing litigation without substantively amending the law. This Court in *Robertson* identified this issue as unresolved, but declined to resolve it. See *Robertson*, 503 U.S. at 441. The courts of appeals, however, have reached divergent conclusions.

On one side of the split, now augmented by the Eighth Circuit, courts of appeals have seized on this Court's language indicating that Congress can "set out substantive legal standards for the Judiciary to apply," *Plaut*, 514 U.S. at 218, and have concluded that Congress can direct the outcome of particular pending cases as long as that result is achieved through legislative enactment. See *Lundeen II*, Pet. App. 12a (finding no separation of powers concern in FRSA § 20106(b) and (c) because the "[c]larification" "was a valid exercise of Congressional power, as it was implemented through the legislative process").

In *Apache Survival Coalition* v. *United States*, 21 F.3d 895 (9th Cir. 1994), for example, the Ninth Circuit concluded that a statute specifying that "the requirements of the Endangered Species Act shall be

deemed satisfied" if the Forest Service met certain conditions, merely "substituted preexisting legal standards . . . with . . . new standards," and thus presented no *Klein* concern. *Id.* at 900, 902. Other circuits have reached similar conclusions. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 389, 395 (2d Cir. 2008) (legislation requiring pending lawsuits meeting statutory criteria to "be immediately dismissed" did not contravene *Klein* because the criteria "permissibly set[ ] forth a new legal standard to be applied to all actions"), *petition for cert. filed*, 77 U.S.L.W. 3267 (U.S. Oct. 20, 2008) (No. 08-530); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1164 (10th Cir. 2004) (statute that overrode a specific settlement agreement "effectively replac[ed] the old standards, in this one case, with new ones"); *Nat'l Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (statute mandating the issuance of a special use permit to build a memorial, and forbidding judicial review of that permit, "impose[d] new substantive rules on [pending] suits," and thus survived *Klein*).

On the other side of the divide are courts of appeals that hold that Congress cannot, even through legislation purporting to establish a new standard, direct the outcome of particular cases. The Fourth Circuit has explained that *Klein* prevents Congress from "dictat[ing] the judiciary's interpretation of governing law and [thereby] mandat[ing] a particular result in any pending case." *Green* v. *French*, 143 F.3d 865, 874 (4th Cir. 1998) (Luttig, J.), *abrogated in part on other grounds*, *Williams* v. *Taylor*, 529 U.S. 362 (2000). It concluded that the provision of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the source of "clearly established" law to Supreme Court decisions does not offend *Klein*,

but only because the statute "simply adopt[s] a choice of law rule" that does not interpret the law or require the courts to reach a particular result. *Id.*

The Seventh Circuit employed the same analysis in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (Easterbrook, J.) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). Interpreting the same AEDPA provision at issue in *Green*, the Seventh Circuit explained that *Klein* precludes Congress from "limiting the interpretive power of the courts," meaning that lawmakers "cannot tell courts how to decide a particular case . . . . Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Id.* at 872. Had the Fourth Circuit or the Seventh Circuit been presented with the issues in *Lundeen II*, the result would have been different: those circuits would have declined to apply the "clarification" of § 20106(b) and (c) because the legislation directed courts to reach a result different from that required by settled precedent in interpreting § 20106(a) and thereby "mandate[d] a particular result in a[ ] pending case." *Green*, 143 F.3d at 874.

2. The Eighth Circuit's decision also provides an unusually good vehicle to resolve the related circuit split concerning the "binding" effect on federal courts of subsequent statutory "clarifications" of earlier legislation, such as the "[c]larification" set forth in § 20106(b).

The Eighth Circuit regarded the § 20106 "[c]larification" as binding alterations of the law, even to the extent of displacing controlling Supreme Court interpretations of the "clarified" statute. See *Lundeen II*, Pet. App. 13a ("[W]e reject [Canadian Pacific's] argument [that] Congress's reference to the amendment as a '[c]larification' of existing law rather

than a substantive change to existing law somehow alters our analysis. We are obliged to apply the amendment to pending cases regardless of the label Congress attached to it.").

Other circuits treat such clarifying amendments as persuasive, but not binding. See, *e.g.*, *Brown* v. *Thompson*, 374 F.3d 253, 259-60 (4th Cir. 2004) (when Congress enacts a statute "purely to make what was intended all along even more unmistakably clear," the views of the subsequent Congress regarding the meaning of a statute enacted by a prior Congress are not binding, but rather are entitled to "great weight") (quotation marks omitted); *Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1281 n.7 (10th Cir. 1998) (clarification amendment is "evidence of [a subsequent] Congress' view of [the] original statute's meaning," but it "may not override [the] plain language of [the] statute") (citing *United States* v. *Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990)); *Whalen* v. *United States*, 826 F.2d 668, 670-71 (7th Cir. 1987) (statutory clarifications "are not necessarily binding, [but] they may provide persuasive evidence" of statutory intent); *cf. United States* v. *Cabrera-Polo*, 376 F.3d 29, 32 (1st Cir. 2004) (in the context of the Sentencing Guidelines, clarifying amendments are "purely expository"); *Burke* v. *United States*, 152 F.3d 1329, 1332 (11th Cir. 1998) ("Clarifying amendments do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline.").

This Court's review would bring clarity to these important questions of statutory interpretation. The Seventh Circuit (per Judge Posner) has explained that the non-binding nature of clarifying amendments "is not easy to reconcile . . . with the

[*Klein*] principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case," and has observed that courts "would welcome clarification from the Supreme Court" on this issue. *Paramount Health Sys., Inc.* v. *Wright*, 138 F.3d 706, 710-11 (7th Cir. 1998). "Otherwise," the court noted, "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation that the district judge had given to the statute, even if that meaning was crystal clear." *Id.* at 710. That is precisely what happened in this case.

C. The scope and import of *Klein* continue to bedevil the courts of appeals in important cases, further justifying this Court's review. *Klein* is "a notoriously difficult decision to interpret," *Biodiversity Assocs.*, 357 F.3d at 1170 (10th Cir.) (McConnell, J.), and the distinction drawn by Klein and related cases between "validly leading the court to reach a different outcome as a result of a change in the underlying law or ... unconstitutionally imposing a different outcome under the previous law" is a "vexed question," *Benjamin* v. *Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997) (Calabresi, J.), *vacated on other grounds*, 172 F.3d 144 (2d Cir. 1999) (en banc). See also William D. Araiza, *The Trouble With* Robertson*: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1074 (1999) (noting "the difficulty courts have had with the *Klein* decision"); *Hart & Wechsler's The Federal Courts and the Federal System* 99-100 & nn.4-5 (5th ed. 2003) (outlining the varying interpretations of *Klein*).

Klein has been at issue, for example, in recent appellate reviews of challenges to AEDPA,[7] the Protection of Lawful Commerce in Arms Act,[8] the Prison Litigation Reform Act,[9] payments to users of the Trans Alaska Pipeline System,[10] and Congress' efforts to legislate the fate of Terri Schiavo.[11] These cases have often resulted in deeply divided panels and patently different approaches to issues implicating *Klein*. See, *e.g.*, *Evans* v. *Thompson*, 524 F.3d 1, 2 (1st Cir.) (Lipez, J., joined by Torruella, J., dissenting from denial of rehearing en banc), *cert. denied*, 129 S. Ct. 255 (2008); *Crater* v. *Galaza*, 508 F.3d 1261, 1264 (9th Cir. 2007) (Reinhardt, J., joined by Pregerson, Gould, Paez, and Berzon, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 128 S. Ct. 2961 (2008); *Davis* v. *Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting

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[7] *See Evans* v. *Thompson*, 518 F.3d 1, 9 (1st Cir.), *cert. denied*, 129 S. Ct. 255 (2008); *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008); *Green*, 143 F.3d at 874; *Lindh*, 96 F.3d at 872.

[8] *See Beretta U.S.A.*, 524 F.3d at 395; *Dist. of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 (D.C. 2008), *petition for cert. filed*, 77 U.S.L.W. 3267 (U.S. Oct. 23, 2008) (No. 08-545).

[9] *See Imprisoned Citizens Union* v. *Ridge*, 169 F.3d 178, 187-88 (3d Cir. 1999) (Alito, J.); *Benjamin*, 124 F.3d at 174; *Taylor* v. *United States*, 181 F.3d 1017, 1039-40 (9th Cir. 1999) (en banc) (Wardlaw, J., joined by Thompson, Kleinfeld, Silverman, and Graber, JJ., dissenting);

[10] *See Petro Star, Inc.* v. *FERC*, 268 F. App'x 7 (D.C. Cir. 2008), *petition for cert. filed sub nom. Exxon Mobil Corp.* v. *FERC*, 77 U.S.L.W. 3105 (U.S. Aug. 18, 2008) (No. 08-212).

[11] *See Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring with denial of rehearing en banc).

from denial of rehearing en banc), *cert. denied*, 549 U.S. 1110 (2007); *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring with denial of rehearing en banc); *id.* at 1281-82 (Tjoflat, J., dissenting from denial of rehearing en banc).

Simply stated, this case presents the opportunity and demonstrates the need for this Court to resolve the meaning and scope of *Klein*. If that decision is to be interred, that undertaking is for this Court, not through repeated equivocations by the courts of appeals. If *Klein* has continuing viability as a check on Congress and a shield against the risks of abuse inherent when legislatures assume the judicial role, then this Court should act in this case to protect the Constitution's separation of powers.

This case also highlights the due process concerns that animate *Klein*. When a statute seeks to dictate the outcome in a particular case through a retroactive "clarification," without changing the underlying substantive law, the legislature significantly harms due process interests that adjudication before an impartial court is designed to protect. See *Klein*, 80 U.S. at 145-46. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992). As Justice Kennedy emphasized in *Eastern Enterprises*, 524 U.S. 498, retroactive legislation of this sort "'neither accord[s] with sound legislation nor with the fundamental principles of the social compact,'" and accordingly, this Court has historically treated such laws with "distrust" and due process challenges to such laws as "serious and meritorious." *Id.* at 547-48 (Kennedy, J.,

concurring and dissenting) (quoting 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)).

Such distrust is particularly well placed when, as in this case, Congress' retroactive "clarification" of an existing statute purports to instruct the courts to relinquish jurisdiction and to deny litigants defenses that the courts had already found to be well established in existing law. As noted in Judge Beam's dissent from the denial of rehearing, "when jurisdiction stripping is coupled with dissipation of substantive rights, as, for instance, when established preemption defenses are taken away from a railroad, due process protections demand a different outcome." Pet. App. 59a. Those compelling concerns provide ample justification for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 8, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Nos. 07-1656, 07-1670, 07-1672, 07-1676,
07-1679, 07-1680, 07-1684, 07-1693,
07-1694, 07-1698, 07-1699, 07-1707.

TOM LUNDEEN, individually; NANETTE LUNDEEN, individually, and TOM LUNDEEN and NANETTE LUNDEEN on behalf of, and as parents and natural guardians of M.L., a minor, and MICHAEL LUNDEEN,

Appellants,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

REBECCA BEHNKIE, individually, and REBECCA BEHNKIE on behalf of, and as parent and natural guardian of NATHANIEL BEHNKIE, a minor,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

LARRY CRABBE; CAROL CRABBE,

Appellants,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

DENISE DUCHSHERER; LEO DUCHSHERER;

Appellants,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

JO ANN FLICK,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

LEO GLEASON,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

MARY BETH GROSS, individually, and MARY BETH GROSS on behalf of, and as parent and natural guardian of BRETT GROSS, a minor,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

BOBBY SMITH; MARY SMITH,

Appellants,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

RACHELLE TODOSICHUK,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

MELISSA TODD,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

RAY LAKODUK,

Appellant,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

MARK NISBET; SANDRA NISBET,

Appellants,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Appellees,

UNITED STATES,

Intervenor.

STATE OF NORTH DAKOTA; STATE OF MISSISSIPPI; STATE OF INDIANA; STATE OF IOWA; STATE OF MARYLAND; STATE OF MINNESOTA; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH DAKOTA; STATE OF NEW HAMPSHIRE; STATE OF UTAH,

Amici Curiae on behalf of Appellants.

Submitted: Jan. 17, 2008.
Filed: July 2, 2008.

Rehearing and Rehearing En Banc Denied
Oct. 10, 2008.

Before BYE, BEAM, and SMITH, Circuit Judges.

BYE, Circuit Judge.

In *Lundeen v. Canadian Pacific Railway Co.*, 447 F.3d 606, 615 (8th Cir.2006)*(Lundeen I)*, we determined the above-captioned lawsuits, initially filed in state court, were preempted by 49 U.S.C. § 20106 of the Federal Railroad Safety Act (FRSA). On remand, the district court dismissed the lawsuits. The Lundeens and other appellants (hereinafter the Lundeens) thereafter filed the instant appeals. While these appeals were pending, Congress amended § 20106. The amendment directly addresses the pre-

emptive effect of § 20106, and if applicable here, would allow these cases to proceed in state court. Canadian Pacific Railway Company (CP) challenges the amendment on several constitutional grounds. We conclude the amendment is constitutional, and therefore vacate *Lundeen I* and remand these cases to the district court with directions to further remand them to state court.

I

On January 18, 2002, a CP freight train derailed near Minot, North Dakota, and caused the release of more than 220,000 gallons of anhydrous ammonia into the air, exposing the area's population to a cloud of toxic gas, causing many people to suffer from permanent respiratory disease and eye damage. Many of the injured people filed a class action suit in North Dakota federal district court. Some, however, retained individual counsel and filed suit in Minnesota state court. These consolidated appeals involve a group of the individual lawsuits filed in Minnesota state court.

The class action venued in North Dakota federal district court was ultimately dismissed on the pleadings upon the district court concluding the claims were preempted by § 20106. *See Mehl v. Canadian Pac. Ry. Ltd.*, 417 F.Supp.2d 1104, 1116-18 (D.N.D.2006). The claims in Minnesota were resolved less consistently, with some being settled, some being resolved in favor of CP on the preemption issue, and still others being resolved against CP on the preemption issue and proceeding in state court.

CP removed a discrete group of the Minnesota cases—those brought by the Lundeens—to Minnesota federal district court. The district court determined

the Lundeens' original complaints alleged a federal cause of action by making a reference to "United States law," creating federal question jurisdiction and making removal to federal court proper. *See Lundeen v. Canadian Pac. Ry. Co.*, 342 F.Supp.2d 826, 829-31 (D.Minn.2004). Subsequent to such ruling, however, the district court allowed the Lundeens to amend their complaints to delete the reference to "United States law," thereby dropping the federal claim and erasing the basis for federal question jurisdiction. After allowing the complaints to be amended, the district court concluded the cases should be remanded to Minnesota state court. *Lundeen v. Canadian Pac. Ry. Co.*, 2005 WL 563111 at * 1 (D.Minn. March 9, 2005).

CP appealed the ruling to this appellate court. We decided federal question jurisdiction was present based upon another ground, that is, preemption under § 20106. *Lundeen I*, 447 F.3d at 615. The cases were thereafter remanded to district court in which the court held federal preemption doomed the Lundeen cases not only on the question of federal versus state jurisdiction, but also on the merits. The district court therefore entered dismissal orders. *See Lundeen v. Canadian Pac. Ry. Co.*, 507 F.Supp.2d 1006, 1017 (D.Minn.2007). The Lundeens filed the present appeals challenging such decision.

In the meantime, the Minot derailment cases were causing a stir on the political front. While the present appeals were pending, Congress passed and President Bush signed into law an amendment to § 20106. The amendment provides in relevant part as follows:

> (b) Clarification regarding State law causes of action.—(1) Nothing in this section shall be construed to preempt an action under State law

seeking damages for personal injury, death, or property damage alleging that a party—

> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

49 U.S.C. § 20106(b). This "clarifying" amendment reflected Congress's disagreement with the manner in which the courts, including our own in *Lundeen I*, had interpreted § 20106 to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state court lawsuit. Congress made the amendment retroactive to January 18, 2002, the day of the Minot derailment. *See id.* at § 20106(b)(2) ("This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002."). In addition, Congress expressly stated § 20106 was not intended to confer federal question jurisdiction upon the federal courts when a party filed a state court lawsuit, as the Lundeens had done. *See id.* at § 20106(c) ("Nothing in this section creates a Federal cause of action on

behalf of an injured party or confers Federal question jurisdiction for such State law causes of action."). Therefore, if valid, subsection (c) of § 20106 effectively overrules our decision in *Lundeen I*.

After the Congressional amendment, we requested from the parties supplemental briefing addressing the impact of the amendment on these consolidated appeals. CP's supplemental brief contends the amendment should be struck down as unconstitutional because it violates the separation of powers doctrine, CP's due process rights, CP's equal protection rights, and the Ex Post Facto clause.

The Lundeens contend Congress acted within its power in amending § 20106, and we must now enforce it by vacating *Lundeen I* and sending these cases back to state court. The Lundeens further contend the amended statute does not violate any of CP's constitutional rights. An amicus brief filed by the North Dakota attorney general on behalf of several states supports the amendment and its recognition of traditional state court jurisdiction. In addition, the United States intervened and filed a brief defending the constitutionality of the amendment.

II

We review constitutional claims de novo. *United States v. Finck*, 407 F.3d 908, 916 (8th Cir.2005).

CP first contends the amendment to § 20106 violates the separation of powers doctrine. We respectfully disagree.

> Congress, of course, has the power to amend a statute that it believes [the courts] have misconstrued. It may even, within broad constitutional

> bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product. No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

In *Plaut v. Spendthrift Farm*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), the Supreme Court reiterated Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases. *Id.* at 218, 115 S.Ct. 1447. The Court explained the separation of powers doctrine is violated only when Congress tries to apply new law to cases which have already reached a final judgment. *See id.* at 226, 115 S.Ct. 1447 ("Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

The amendment to § 20106 was a valid exercise of Congressional power, as it was implemented through the legislative process. In addition, Congress made clear its intent to reach conduct preceding the corrective amendment by expressly indicating it applied "to all pending State law causes of action arising from events or activities occurring on or after January 18,

2002." 49 U.S.C. § 20106(b)(2). Furthermore, applying the amendment to the cases now before us does not violate the separation of powers doctrine because when the amendment became effective these cases were on appeal and had not reached final judgments. Finally, we reject CP's argument about Congress's reference to the amendment as a "[c]larification" of existing law rather than a substantive change to existing law somehow alters our analysis. We are obliged to apply the amendment to pending cases regardless of the label Congress attached to it. *See Porter v. Comm'r of Internal Revenue*, 856 F.2d 1205, 1209 (8th Cir.1988) ("Our objective in interpreting a federal statute is to achieve the intent of Congress."). The statute's clear language indicates state law causes of action are no longer preempted under § 20106.

CP next contends the amendment to § 20106 violates its due process rights because the amendment's effective date (the day of the Minot derailment) indicates Congress specifically targeted CP and upset its settled expectations about the state of the law governing its business activities.

We review legislation regulating economic and business affairs under a "highly deferential rational basis" standard of review. *Koster v. City of Davenport, Iowa*, 183 F.3d 762, 768 (8th Cir.1999). "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). Even retroactive legislation

passes due process scrutiny so long as Congress had "a legitimate legislative purpose [that it] furthered by rational means." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992); *see also United States v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 733-34 (8th Cir.1986) ("Due process is satisfied simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."). To prevail on its due process claim, CP has the burden of showing there is no "reasonably conceivable state of facts that could provide a rational basis" for the law. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

CP has not satisfied its heavy burden of showing the amendment violates its due process rights. The purpose of the amendment is to give railroad accident victims the right to seek recovery in state courts when they allege railroads violate safety standards imposed by a railroad's own rules, certain state laws, or federal regulations. This easily qualifies as a rational legislative purpose for the amendment. Contrary to CP's claim that the amendment seeks "to impose unlimited liability [upon CP] for" the Minot derailment case, CP's Brief at 49, the amendment merely gives injured parties the *chance* to seek recovery against railroads. Victims of railroad accidents must still prove their cases in court. Prior to the amendment, § 20106 had been interpreted in such a way that an injured person was denied the mere chance to hold a railroad accountable when its negligence not only violated state common law standards, but the very federal laws and regulations approved by Congress in an effort to further railroad safety. It was rational for Congress to "clarify" this result was not an intended purpose of § 20106 prior

to the amendment. Indeed, the very act of enacting a retroactive statute "to correct the unexpected results of [a judicial] opinion" qualifies as a legitimate legislative purpose which survives scrutiny under the deferential rational basis standard of review. *Romein*, 503 U.S. at 191, 112 S.Ct. 1105 (upholding retroactive legislation against a due process challenge where the legislation was passed to overturn a particular Michigan Supreme Court opinion interpreting a workers' compensation statute).

CP contends Congress acted arbitrarily and capriciously by making the amendment retroactive to January 18, 2002, the very date of the Minot derailment cases, because by doing so Congress singled out one accident and one railroad (CP). This argument misses the mark on both the facts and the law. Factually, the amendment does not single out one accident and one railroad: it applies to "*all* pending State law causes of action arising from events or activities occurring on or after January 18, 2002." 49 U.S.C. § 20106(b)(2) (emphasis added). From a legal standpoint, however, even assuming Congress meant to target one particular event or specific pending litigation, it could do so without violating the constitution so long as it had a rational basis for doing so. *See Plaut*, 514 U.S. at 239 n. 9, 115 S.Ct. 1447 ("Congress may legislate 'a legitimate class of one'" when it has a rational basis for doing so) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)); *see also Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 433, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992) (rejecting a constitutional challenge to a statute known as the Northwestern Timber Compromise, which Congress passed to resolve two specific pending lawsuits between environmentalists and the logging industry).

Congress can rationally decide to pick an effective date for legislation which will address the particular event which attracted its attention. *See Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (recognizing legislative "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"); *see also Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) (refusing to second-guess the balance of benefits and harms struck by Congress in selecting a statute's effective date, noting "the enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation . . . is a customary congressional practice").

CP also contends the amendment violates its equal protection rights because it imposes different standards of accountability on railroads depending on whether they caused harm before or after January 18, 2002, the amendment's effective date. Unless a statute creates a suspect classification or impinges upon fundamental rights—and this one does neither—it must "be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends." *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982).

In addressing CP's due process claim, we already explained Congress had legitimate legislative purposes for adopting the amendment and acted rationally in doing so. As a consequence, CP's equal protection argument fails. Moreover, we note CP's equal protection claim is nothing more than an attack on the amendment's effective date. Every retroactive

statute, by necessity, imposes different standards on parties affected by the statute, and those differences are directly tied to the statute's effective date. Thus, if we gave credence to CP's equal protection claim we would in essence be holding Congress violates the equal protection clause every time it passes retroactive legislation.

Finally, CP argues the amendment violates the Ex Post Facto clause. The Ex Post Facto clause prohibits "enacting laws that increase punishment for criminal acts after they have been committed." *Doe v. Miller*, 405 F.3d 700, 718 (8th Cir.2005). It applies only in the criminal context. *See, e.g., E. Enters. v. Apfel*, 524 U.S. 498, 538, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) ("Since *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context.") (Thomas, J., concurring). While a civil statute may be "so punitive either in purpose or effect [as to implicate the Ex Post Facto clause], only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (internal citations and quotations omitted).

There is no proof, let alone clear proof, Congress intended the amendment to § 20106 as a criminal penalty. The statute affects negligence actions brought by injured parties against railroads. Such actions are inherently civil in nature. The Ex Post Facto clause has no application here.

III

Congress did not violate the Constitution when it amended § 20106. As a consequence, we vacate our decision in *Lundeen I* and remand these cases to the

district court with instructions in turn to further remand them to state court.

BEAM, Circuit Judge, dissenting.

This appeal presents the question of whether recent amendments to the Federal Railroad Safety Act (amended version hereinafter referred to as "FRSA II"), initially adopted in 1970 as 49 U.S.C. § 20106 (original 1970 version hereinafter referred to as "FRSA I"), change the preemptive and retroactive effect of the law and, if so, to what extent? Respectfully, I believe that the court, speaking through the panel majority, misconceives the substance and applicability of Congress's amendments and unconstitutionally uses the amended statute to repeal and vacate a final order of this court that fully and finally grants Canadian Pacific (CP) vested property, procedural and jurisdictional rights. Accordingly, I dissent.

The underlying facts and legal issues are set forth in some detail in *Lundeen v. Canadian Pacific Railway Co.*, 447 F.3d 606 (8th Cir.2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 1149, 166 L.Ed.2d 993 (2007)*(Lundeen I)*, and, in a limited, but incomplete, way in the majority's opinion. Thus, I further outline the extant procedural and chronological circumstances of this case only as necessary to present a full understanding of this dispute, its history and its ramifications.

BACKGROUND

Subsequent to the Minot, North Dakota, derailment mentioned by the court, the Lundeens,[1] citizens

[1] Herein, "the Lundeens" refers to all plaintiffs consolidated under the lead case, 07-1656, who remain as parties as of the date of this opinion.

of North Dakota, filed a common law negligence action in Minnesota state court against CP, a citizen of Minnesota. In support of their state common law claim, the Lundeens' initial complaint made a minimal reference in paragraph V to duties arising under the "Federal Railroad Administration" (FRA) regulations and very briefly alleged in count seven "breaches of statutory rules and regulations including, but not limited to, violations of FRA rules and regulations, violations of the Code of Federal Regulations, . . . and other applicable state or federal law or administrative regulatory agencies of the States of North Dakota and Minnesota and the United States government." Complaint at 2, 18-19, *Lundeen v. Canadian Pac. Ry. Co.*, No. 04-3220 (Dist. Ct. of Minn., Fourth Judicial Dist., Hennepin County, June 28, 2004). The initial complaint asserted, in counts one through six, *id.* at 14-18, common law claims of "negligence, gross negligence, carelessness, recklessness and willful, wanton, intentional and deliberate acts and omissions." *Id.* at 14. These state claims were accompanied by several specific allegations of negligent and willful acts, but none of these allegations assert a direct violation of a federal statute, order or regulation or seek damages directly resulting from such violation.

This pleading, which garnered a forum shopping objection by CP, was obviously designed to accomplish Minnesota state court adjudication of state common law claims.[2] Indeed, the Lundeens carefully

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[2] The Minnesota court determined in similar cases proceeding from the January 18, 2002, derailment, that under the applicable choice-of-law provisions, the substantive law of North Dakota applied. *In re Soo Line R.R. Co. Derailment of January 18, 2002*, No. MC 04-007726, 2006 WL 1153359 (Apr. 24, 2006). That

attempted to avoid stating what they believed to be a federal claim or inadvertently asserting a federal cause of action under the terms of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) and its precursor case *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986) (federal jurisdiction lies over state court claims that implicate significant federal issues). For instance, in response to CP's removal notice, the Lundeens argued that their citations to "'United States law' pertain[ed] [only] to federal maintenance and repair regulations [presumably FRSA regulations] that [CP] violated, causing the train to derail and spill ammonia in *violation of state environmental laws.*" *Lundeen v. Canadian Pac. Ry. Co.*, 342 F.Supp.2d 826, 830 (D.Minn.2004) (emphasis added).

Nonetheless, CP, pursuant to 28 U.S.C. § 1441(a) and (b), filed a timely notice of removal of the action to the United States District Court for the District of Minnesota, alleging federal court jurisdiction based upon the "arising under" explications found in 28 U.S.C. § 1331. The Lundeens gamely sought remand of the case to state court, arguing that no section 1331 claims were alleged in their complaint. But, employing the venerable "well-pleaded complaint rule" established by *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), United States District Judge Richard Kyle disagreed and denied the motion to remand. Judge Kyle found that the face of the complaint "states a federal ques-

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determination is applicable here. While there are also federal law issues at work in this matter, this ruling is clearly correct with regard to any purely state law claims.

tion," specifically noting that "[t]he Complaint alleges that '[CP] *violated applicable state law . . . as well as United States law.*'" *Lundeen*, 342 F.Supp.2d at 829 (third alteration and emphasis in original).

The Lundeens did not appeal this ruling. Rather, in response to the district court's determination, the Lundeens moved to amend their complaint to delete *all* references to United States law. Judge Kyle, over CP's objection, granted the motion.

Thereafter, the Lundeens filed an amended complaint in which all reference to federal duties was deleted. With that, they renewed their motion to remand their claims to state court. The district court determined that it could see no federal jurisdiction established by the amended complaint and ordered a remand, refusing to invoke its discretionary federal supplemental jurisdiction over state claims under 28 U.S.C. § 1367, citing as bases *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (remand is appropriate when all federal claims have been dropped and only state law claims remain), and 28 U.S.C. § 1367(c)(3) (district court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it had original jurisdiction). This remand judgment "'put[ ] the litigants . . . "effectively out of [federal] court" and [was] therefore a final order appealable under 28 U.S.C. § 1291.'" *Lindsey v. Dillard's, Inc.*, 306 F.3d 596, 599 (8th Cir.2002) (quoting *St. John v. Int'l Ass'n of Machinists & Aerospace Workers*, 139 F.3d 1214, 1217 (8th Cir.1998)). CP appealed *(Lundeen I)*.

While 28 U.S.C. § 1447(c) and (d) preclude appeal of a remand based upon lack of subject matter jurisdiction, orders "made under § 1367(c)," as here,

are reviewable by the court of appeals. *Lindsey*, 306 F.3d at 599. This is because such remands are discretionary under 28 U.S.C. § 1367(c), and are not deemed to be actions based upon "lack of subject matter jurisdiction." *Id.* In this regard, the Supreme Court has declined (or at least has stated that it has never passed on the issue) to find that a *Cohill* remand is subject matter jurisdictional for the appeal-limiting purposes of sections 1447(c) and (d). *Powerex Corp. v. Reliant Energy Servs., Inc.*, --- U.S. ---, 127 S.Ct. 2411, 2419 n. 4, 168 L.Ed.2d 112 (2007). Accordingly, this panel considered CP's claim of federal jurisdiction. *Lundeen I*, 447 F.3d at 611.

On appeal, the Lundeens continued to contend that the amended complaint asserted only a state common law claim, that there was no private federal cause of action available to them, and that remand to state court was required. CP, on the other hand, argued that federal jurisdiction over the litigation was dictated by FRSA I under the "complete preemption doctrine" announced in *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir.1996).

"Complete preemption provides an exception to the well-pleaded complaint rule" and "can arise when Congress intends that a federal statute preempt a field of law so completely that state law claims are considered to be converted into federal causes of action." *Id.* And, "[t]he issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute." *Id.* at 547 (citing *Caterpillar*, 482 U.S. at 391 n. 4, 107 S.Ct. 2425).

A federal jurisdictional question presents an issue of law that is reviewed de novo, and a "district court has no discretion to remand a claim that states a

federal question." *Id.* at 542. So, following precedent established by this circuit in *Peters v. Union Pacific Railroad Co.*, 80 F.3d 257, 262 (8th Cir.1996) and *In re Derailment Cases*, 416 F.3d 787, 793-94 (8th Cir.2005), this panel unanimously, and correctly, determined that the federal district court had subject matter jurisdiction under the complete preemption doctrine, reversed Judge Kyle's remand order and returned the case to the federal district court for further proceedings consistent with the judgment. *Lundeen I*, 447 F.3d at 614-15. The case was reassigned to Chief United States District Judge James Rosenbaum.

The Lundeens immediately sought rehearing and rehearing en banc by the court, which was denied. The mandate issued and the Lundeens petitioned the Supreme Court for a writ of certiorari, specifically contesting the circuit's complete preemption ruling and the existence of federal court jurisdiction. See Petition for Writ of Certiorari, *Lundeen I*, 447 F.3d 606. The Lundeens sought a stay in district court while their Supreme Court petition was pending. On January 22, 2007, the Supreme Court denied certiorari. The district court then addressed the Lundeens' preemption and jurisdiction arguments. The Lundeens argued in the district court that whatever preemptive effect must be accorded FRSA I, the statute and its duly promulgated orders and regulations were not specifically detailed enough to substantially subsume plaintiffs' separate state common law negligence claims and, thus, did not preempt them. *Lundeen v. Canadian Pac. Ry. Co.*, 507 F.Supp.2d 1006, 1011-13 (D.Minn.2007). In the alternative, the Lundeens contended that their common law claims "merely parallel duties imposed by [the] federal regulation." *Id.* at 1015-16. The district court noted that the Lundeens

failed to provide any binding precedent supporting their "parallel claim" proposition. *Id.* at 1016. And, further, that their claims failed under the applicable FRSA preemption standards. This holding is in line with the Lundeens' argument before this court in *Lundeen I* when counsel stated, "we never intended to assert a federal claim . . . if you look at the original complaint, the clear gravamen of that complaint is state law claims—negligence, personal injury and property damage—arising out of this derailment." *Lundeen I*, Oral Argument, Oct. 14, 2005. The district court ruled that all claims in the Lundeens' amended complaint were within the subject matter of FRSA I and completely preempted by the Act. There being no discernible federal private cause of action under FRSA I, the district court dismissed the amended complaint with prejudice on February 2, 2007. *Lundeen*, 507 F.Supp.2d at 1017. Thereafter, the Lundeens noticed the current appeal. *Lundeen v. Canadian Pac. Ry. Co.*, No. 07-1656 (8th Cir.) *(Lundeen II)*.

In this appeal, the Lundeens persist in arguing that "[m]ost of [their] claims are not covered, or even addressed at all, by federal requirements." Br. of Appellants at 24, *Lundeen II*, (8th Cir. May 11, 2007). They claim the district court erred in applying FRSA preemption so broadly. The Lundeens state that because FRSA I targets only federal "law, regulation, or order," tort remedies provided by the states by way of common-law duties are actionable and not preempted, citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443-44, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

The Lundeens also assert that the preemptive scope of FRSA I should be disregarded because

Congress could not have meant to bar all judicial recourse for their damage claims. Unfortunately for them, *Riegel v. Medtronic, Inc.*, --- U.S. ---, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008), rejects this proposition. *Riegel* explains that this is often exactly what a federal preemption clause does—it bars state common law claims even without making a private federal cause of action available to an injured party. *Id.* at 1009.

On August 3, 2007, while this appeal pended for nearly six months, Congress enacted, through an unrelated Conference bill, partially retroactive legislation amending FRSA I. With this enactment, the Lundeens changed the nature of their arguments on appeal, asserting new rights and assigning new liabilities arising from FRSA II, all the while misapplying part of the language of the amended statute. They now mainly claim that the amendments essentially eliminate the preemptive thrust of FRSA I and make this change retroactive to January 18, 2002, the date of the Minot derailment. They seek vacation of *Lundeen I* and Judge Rosenbaum's order and judgment dismissing the pending action on their pleadings. The Lundeens also seek remand of their common law negligence claims (considered in Judge Kyle's ruling) to the Minnesota state court for further proceedings. The Lundeens' formal request in this regard comes by way of a Motion to Affirm [Judge Kyle's] March 9, 2005, Remand Order. In essence, this motion, based upon the congressional amendments that create FRSA II, seeks a legislative reversal of the court's federal jurisdictional ruling in *Lundeen I*.

DISCUSSION

A. The New Statute

FRSA II reads as follows

> (a) National uniformity of regulation.—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.
>
> (b) Clarification regarding State law causes of action.—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transporta-

> tion (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.
>
> (c) Jurisdiction.—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106(a)-(c) (Aug. 3, 2007). Subsection (a) of amended section 20106 is a word-for-word rendition of 49 U.S.C. § 20106 as it existed in its entirety prior to the August 3, 2007, amendments.

B. Preemption

The court majority, at the Lundeens' urging, sees sweeping consequences arising from FRSA II. For example, the majority says "[t]his 'clarifying' amendment," referring to new subsection (b), "reflected Congress's disagreement with the manner in which the courts, including our own *Lundeen I*, had interpreted [FRSA I] to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state

court lawsuit." *Ante* at 688. Respectfully, the amendment reflects nothing of the sort. Indeed, the adoption of such an expansive and simplistic rationale over-reads subsections (b) and (c), essentially repealing subsection (a) of the amended Act and stripping federal jurisdiction from both versions of the legislation.[3]

Before the Lundeens' claims can be evaluated, a correct interpretation of the amended statute must be undertaken. Prior to proceeding, however, we are necessarily reminded of three important points. First, an elemental canon of statutory construction requires that an enactment be interpreted so as not to render one of several parts inoperative, especially a part that represents the fundamental thrust of the legislation.[4] *Mountain States Tel. & Tel. Co. v. Pueblo of*

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[3] Adoption of the majority's overreaching conclusions would appear to strip federal appeals courts of jurisdiction to carry out their appellate duties over the administrative activities of the Secretary of Transportation and Attorney General. 49 U.S.C. §§ 20111, 20112. Appellate review is contemplated by these enforcement provisions.

[4] There can be no real argument that the overriding purpose and legislative intent of both FRSA I and FRSA II(a), as expressed in the unambiguous language of the two statutes and as complemented by the 1970 legislative history of FRSA I, is the creation of federally imposed national uniformity of laws, regulations and orders related to railroad safety as prescribed by the Secretary of Transportation. The legislative history of the Act states:

> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. . . . [States] will have no authority to assess and compromise penalties or *to seek State judicial action*. . . . This Committee is of the opinion that the provision that States be permitted to

Santa Ana, 472 U.S. 237, 249, 105 S.Ct. 2587, 86 L.Ed.2d 168 (1985) (citing *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). Second, as earlier noted, subsection (a) of FRSA II is a word-for-word reenactment of FRSA I as the statute had existed since 1970. Third, at least three panels of this court have construed the language contained in FRSA I as preempting the field of railroad safety and subsuming any state common law causes of action purporting to arise under the subject matter of this section. *Peters*, 80 F.3d at 262; *In re Derailment Cases*, 416 F.3d at 793-96; and *Lundeen I*, 447 F.3d at 615.

With these principles in mind, I turn to the amended statute.

Subsection (a) of FRSA II, like its earlier counterpart FRSA I, unambiguously requires national uniformity of railroad safety laws, regulations and orders. And, as noted in footnote four, the legislative history of the Act reflects Congress's overarching intent that railroad safety be the ultimate right and responsibility of the federal government and not the province of the fifty states as well as the federal government. Thus, to make operative the intent of subsection (a), subsections (b) and (c), if they pass

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> enforce Federal standards does not lend itself to the regulation of the railroad industry; [subject to exceptions not relevant here]. . . . With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operation, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system.

H.R.Rep. No. 91-1194 (1970), 1970 U.S.Code Cong. & Admin.News 4104, 4109-10 (emphasis added).

muster under the Constitution,[5] must be read as narrowly as necessary to avoid an implied repeal of subsection (a)'s continuing and clearly stated federal railroad safety act preemptions. Indeed, it would be incongruous for Congress to reenact 49 U.S.C. § 20106(a) as the mirror image of 49 U.S.C. § 20106 only to essentially repeal it under the guise of "clarifications" set forth in section 20106(b).[6] Yet, that is exactly what the Lundeens propose and what the panel majority embraces.

To avoid this untoward result, subsection (b) must be read for what it is, a limited and focused exception to the preemptive intent of subsection (a). Significantly, subsection (b) opens doors for plaintiffs like the Lundeens. By way of subsection (b)(1), Congress has authorized the creation of a state cause of action, but at the same time has carefully protected the concept of federal uniformity established by subsection (a). This cause of action is limited to allegations regarding the failure of a defendant to comply with the federal standards of care established by regulation or order issued by the Secretary of Transportation, or the failure to comply with a plan, rule or standard created pursuant to regulation or order of the Secretary. This limited claim for damages preserves the federal uniformity demanded by the FRSA. Accordingly, any state law cause of

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[5] CP contends that this entire amendatory exercise by Congress is unconstitutional, and it may well be. Applying the doctrine of constitutional avoidance, we need not answer this question because we can decide this dispute by applying the amended statute. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

[6] It is clear that the FRA agrees with this assessment. *See* 49 C.F.R. §§ 217.2 and 218.4.

action permitting railroad liability based upon more expansive state-based requirements than those directly established by the Secretary's regulations, rules or orders, does not pass muster under FRSA II.[7] In the end, states are free to enact legislatively, or, if permitted by state law, adopt by way of common law pronouncement from a state's highest court, a private damages remedy limited by the language of section 20106(b)(1). Viewing this matter from another perspective, if the subsection (b)(1) cause of action is not limited to a remedy based wholly upon a violation of the Secretary's regulations and orders, subsection (a) of the amended Act essentially becomes a dead letter.

To protect the uniformity required by subsection (a), subsection (b)(1) imposes specific pleading standards, as Congress often does in preemption clauses. *See, e.g* , Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb(f); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006); *see also In re NVE Corp. Sec. Litig.*, 527 F.3d 749 (8th Cir.2008) (Private Securities Litigation Reform Act requires the pleading of specific statements and particular facts).

Subsection (c) of FRSA II specifies that the amended Act does not create a federal private cause of action (a matter that has never been advanced by the Lundeens or CP) or confer federal question jurisdiction arising under the limited state law cause of action authorized by subsection (b)(1). On the other

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[7] Subsection (a)(2)(A), (B), and (C), of course, permits a state to adopt requirements that are purely local in nature, not incompatible with federal regulations and orders such as those of the Secretary of Transportation or that do not unreasonably burden interstate commerce. No such adoptions are in play in this appeal.

hand, subsection (c) does not strip federal jurisdiction from any matter covered by the amended Act except for the newly created subsection (b)(1) action. Neither does subsection (c) preclude federal diversity jurisdiction over either an original filing or a case removed under 28 U.S.C. § 1441(a) and (b).[8]

Despite the clarification at (b)(1), the Lundeens' present state causes of action are preempted. *Riegel* provides guidance. Justice Scalia, for the *Riegel* Court, canvasses and discusses the preemption precedent established in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); and *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005), the seminal cases on preemption prior to *Riegel*. But, *Riegel* is the primer from which we read.

Charles Riegel was injured when his physician attempted to install (or misinstall) a heart catheter device manufactured and marketed by Medtronic. The device had received pre-marketing approval from the federal Food and Drug Administration (FDA) under the Medical Device Amendments of 1976 (MDA). 21 U.S.C. §§ 360c et seq. The MDA includes an express preemption provision somewhat similar to that found in FRSA II. It states:

> Except as provided in subsection (b) of this section, no State or political subdivision of a

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[8] The provisions of 28 U.S.C. § 1332 clearly create federal diversity jurisdiction, including diversity removal jurisdiction, over a subsection (b) state-created remedy. Whatever else the amendments creating FRSA II may do, they clearly do not abrogate federal diversity jurisdiction over any disputes arising under the Act, or, in fact, arising in this case.

> State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> > (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
> >
> > (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter. § 360k(a).
>
> The exception contained in subsection (b) [like those found in FRSA II] permits the FDA to exempt some state and local requirements from preemption.

Riegel, 128 S.Ct. at 1003 (quoting 21 U.S.C. § 360k). Riegel and his spouse brought suit seeking a New York state common law remedy based upon a number of causes of action including the common law tort of negligence. The district court found preemption and the Second Circuit affirmed, saying the Riegels' common law claims were pre-empted because they "would, if successful, impose state requirements that differed from, or added to" the device-specific federal requirements. *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 121 (2d Cir.2006), aff'd, --- U.S. ---, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008). The Supreme Court granted certiorari.

Analyzing section 360k(a)'s "different from or in addition to" language, *Riegel* observed that

> In *Lohr*, five Justices concluded that common-law causes of action for negligence and strict liability do impose "requirement[s]" and would be pre-empted by federal requirements specific to a

medical device. We adhere to that view. In interpreting two other statutes we have likewise held that a provision pre-empting state "requirements" pre-empted common-law duties. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005), found common-law actions to be pre-empted by a provision of the Federal Insecticide, Fungicide, and Rodenticide Act that said certain States "'shall not impose or continue in effect *any requirements* for labeling or packaging in addition to or different from those required under this subchapter.'" *Id.* at 443, 125 S.Ct. 1788. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), held common-law actions pre-empted by a provision of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b) which said that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" whose packages were labeled in accordance with federal law. *See* 505 U.S. at 523, 112 S.Ct. 2608 (plurality opinion); *id.* at 548-549, 112 S.Ct. 2608 (Scalia, J., concurring in judgment in part and dissenting in part).

. . . As the plurality opinion said in *Cipollone*, common-law liability is "premised on the existence of a legal duty," and a tort judgment therefore establishes that the defendant has violated a state-law obligation. *Id.* at 522, 112 S.Ct. 2608. And while the common-law remedy is limited to damages, a liability award "'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* at 521, 112 S.Ct. 2608.

Riegel, 128 S.Ct. at 1007-08 (some citations omitted). Affirming the Second Circuit, *Riegel* determined that the Riegels' state negligence action was preempted by section 360k(a) of the MDA.

I concede that the MDA as discussed in *Riegel* deals with a product or service different from that of the FRSA. But, for preemption analysis, any differences are immaterial—the preemption language and the regulatory requirements are analogous. For federal preemption purposes, a medical device manufactured and marketed under a regime employing specific federal safety requirements is little different from a railroad service formulated and delivered under specific federal safety regulations. Thus, *Riegel* provides the precedent we must apply.

Like the medical device in *Riegel*, the railroad service in *Lundeen* is entitled to be delivered free of state requirements that differ from the federal regime. And, when the amended statute is properly construed, the limited state cause of action authorized by FRSA II fits within that paradigm. So, with minor exceptions not applicable in *Lundeen*, all state railroad safety requirements that are in addition to or different from those established under FRSA II are preempted. Paraphrasing Justice Scalia's comment in *Riegel*, excluding North Dakota common law duties from the scope of FRSA II preemption scheme would make little sense. *Id.* at 1008.

At the bottom line, FRSA II authorizes North Dakota to provide the Lundeens a state court cause of action designed to carefully protect the uniformity demanded by subsection (a). This is so because any alleged violations of duty by CP must be based upon breaches of standards of conduct promulgated by the Secretary of Transportation by authority of subsec-

tion (a). There being no indication that any such limited remedy has yet been enacted or adopted (or that any such remedy has been pleaded even if it were to exist), the Lundeens' amended complaint is preempted by FRSA II as a matter of law. Accordingly, the district court must be affirmed and the case dismissed without prejudice to the filing of a new suit by the Lundeens if and when an FRSA II-authorized state action is created in North Dakota.

C. Retroactivity

Overlooking a narrowed construction of FRSA II, and relying upon the efficacy of their amended complaint, the Lundeens advance a broad retroactive application of the amended law. They seem to contend, as apparently does the panel majority, that the new legislation wholly unravels *Lundeen I* and even breathes new life into Judge Kyle's remand order reversed by the unanimous panel. This is error.

Following the enactment of FRSA II, the Lundeens, as earlier recognized, filed in this appeal a Motion to Affirm [Judge Kyle's] March 9, 2005, Remand Order. The pleading asserts several unsupportable claims concerning retroactivity, especially a claim regarding the purported clarifications and statements in subsections (b) and (c). The motion contends that notwithstanding the language of subsection (a), subsection (b)(1), supplemented by the retroactive thrust of subsection (b)(2), provides that on and after January 18, 2002, their amended complaint totally survives FRSA I preemption. Again, this grossly misreads the legislation. The Lundeens argue that "[c]ongressional intent is the touchstone for determining the preemptive effect of a statute." *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 886 (8th Cir.2005). I agree. However, the problem facing the Lundeens is

that such intent emerges from the statutory language and, if ambiguity exists, with the help of legislative history. Legislative intent does not spring from the wishes and hopes of a disappointed party.

The pronouncements of subsection (b)(2) do not help the Lundeens. In fact, two problems emerge for them with regard to Judge Kyle's order. First, any retroactivity announced in subsection (b)(2) refers to and runs only to causes of action enabled by and filed under authority of subsection (b)(1). Likewise, any dilution of federal jurisdiction announced in subsection (c) runs only to state law causes of action authorized by subsection (b)(1), not to North Dakota common law assertions made by the Lundeens in their amended complaint and considered when FRSA I was the law. And, it bears repeating, Congress addressed no issue of retroactivity except that found in subsection (b)(2), which by its language applies only to subsection (b).[9] Accordingly, none of the issues decided by Judge Kyle or this panel in *Lundeen I* are reached by the language of FRSA II.

Second, the jurisdictional finding of *Lundeen I* was a final judgment that cannot constitutionally be

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[9] "[A] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We will not construe enactments to have retroactive effect unless their language requires this result. *Id.* at 272, 114 S.Ct. 1483. Thus, we look to the clear intent of Congress, as set forth in the statutory language. *Id.* Requiring such expression of intent by Congress "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application." *Id.* In this case, we do not, then, second-guess why Congress applied the retroactivity language in (b)(2) only to the state law causes of action contemplated in (b)(1).

reopened or reversed by Congress or this court. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). I agree with the Lundeens that constitutionally enacted legislative amendments must be applied to pending litigation. *Id.* at 226, 115 S.Ct. 1447. But here, even assuming the constitutionality of FRSA II, that means we must apply the legislation only to the instant appeal—a review of Judge Rosenbaum's order of dismissal. *Lundeen I* and the prior jurisdictional rulings concerning the Lundeens' amended complaint are not pending. Thus, the Lundeens miss the mark in their motion.

I recap their problem in this context. *Lundeen I* decided an issue of federal subject matter jurisdiction under FRSA I. So, as previously stated, the reference to retroactive validity of "State law causes of action" found in subsection (b)(2), neither mentions nor by implication applies to subsection (a), the portion of FRSA II in force and effect when Judge Kyle ruled and this court decided *Lundeen I*.[10] Thus, to repeat an earlier point, any retroactive language in (b)(2) neither refers to nor affects (a), only (b)(1). But, the Lundeens contend that so long as Judge Rosenbaum's

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[10] *See, e.g., Boumediene v. Bush*, --- U.S. ----, 128 S.Ct. 2229, 2265, 171 L.Ed.2d 41 (2008) (""[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972))). Here, Congress provided language mandating retroactivity in subsection (b)(2) referring directly to subsection (b)(1) but provided no language whatever concerning retroactivity of subsection (a) or any other portion of the amended statute.

judgment of dismissal is on appeal in the federal court hierarchy, Judge Kyle's remand order is likewise on appeal and open for modification and affirmance. The Lundeens supply no support for this theory, other than reliance on Plaut, which runs to the contrary.

Lundeen I's jurisdictional judgment has been fully appealed, including a writ of certiorari to the Supreme Court, and any appeal day has long since passed. Indeed Lundeen I is not a "judgment[ ] still on appeal" in any sense contemplated by Plaut. *Plaut*, 514 U.S. at 226, 115 S.Ct. 1447. The Lundeens mistake the Court's language in Plaut to apply to a pending case. But, Plaut speaks to the effect of newly created, retroactive law on pending judgments. Plaut clarifies that "the decision of an inferior court is not *(unless the time for appeal has expired* [as it has in *Lundeen I*]*)* the final word of the department as a whole." *Id.* at 227, 115 S.Ct. 1447 (emphasis added). This means that once the time for appeal has expired, the word of the last court in the hierarchy that ruled on the case is final, and not pending. *Id.*

Any congressional attempt to reverse *Lundeen I*, as suggested by the Lundeens, presents an insurmountable separation of powers problem. While not a perfect fit on the issue, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855)*(Wheeling II)* is path-marking. *Wheeling II* determined that when pending executory rulings, such as injunctions, are at issue, subsequent congressional intent may amend such an interlocutory ruling. However, when an appealable judgment is an action at law, as here, and has been finalized under all available appeal procedures, the right to alter the judgment has "passed beyond the reach of the power

of congress." *Id.* at 431. The Supreme Court has analyzed the separation of powers issues in similar circumstances. In *Plaut*, the Court held that Congress violates the fundamental principle of the separation of powers when it retroactively commands the federal courts to reopen final judgments. *Plaut*, 514 U.S. at 219, 115 S.Ct. 1447. "'A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.'" *Id.* at 222, 115 S.Ct. 1447 (quoting The Federalist No. 81, p. 545 (J. Cooke ed.1961)).

While Judge Rosenbaum's judgment of dismissal may be on appeal, and subject to amendment and reversal by congressional enactment, this panel's unanimous judgment in *Lundeen I* based upon a then-valid preemption mandate, that has not been retroactively disturbed by statutory language and has been fully vetted by the court en banc and the Supreme Court, is not subject to congressional disposition. It is a final judgment that may not be upset by an inapplicable portion of subsequent legislation. The majority errs in its ruling to the contrary.[11]

CONCLUSION

The Lundeens and the panel majority misread, misstate and misapply both the preemptive impact and the retroactive effect of the amended statute.

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[11] I note, too, with an emphasis on the "need to preserve finality in judicial proceedings," that the court majority fails to discuss the authority under which we recall the mandate in *Lundeen I*. *Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir.1996). The panel majority's opinion is void of any discussion concerning the exceptional circumstances needed to warrant their action. *Calderon v. Thompson*, 523 U.S. 538, 549-50, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998).

Accordingly, the Lundeens' Motion to Affirm [Judge Kyle's] March 9, 2005 Remand Order should be denied and Judge Rosenbaum's judgment of dismissal should be affirmed, but without prejudice.

I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-1656

TOM LUNDEEN, individually and NANETTE LUNDEEN, individually, and TOM LUNDEEN and NANETTE LUNDEEN on behalf of, and as parents and natural guardians of M.L., a minor, and MICHAEL LUNDEEN,
Appellants

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1672

LARRY CRABBE AND CAROL CRABBE,
Appellants

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1676

DENISE DUCHSHERER AND LEO DUCHSHERER,
Appellants

JOSHUA DUCHSHERER,

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1679

JO ANN FLICK,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1680

LEO GLEASON,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1684

MARY BETH GROSS, individually, and MARY BETH GROSS on behalf of, and as parent and natural guardian of BRETT GROSS, a minor,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1693

BOBBY SMITH AND MARY SMITH,
Appellants

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1694

RACHELLE TODOSICHUK,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEVADA, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1698

MELISSA TODD,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1699

RAY LAKODUK,
Appellant

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

No: 07-1707

MARK NISBET AND SANDRA NISBET,
Appellants

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.,
Appellees

STATE OF NEW HAMPSHIRE, et al.,
Amici on behalf of Appellant

UNITED STATES,
Intervenor

Appeal from U.S. District Court for the District of Minnesota – Minneapolis
(0:04-cv-03220-JMR)
(0:04-cv-03284-JMR)
(0:04-cv-03287-JMR)
(0:04-cv-03290-JMR)
(0:04-cv-03291-JMR)
(0:04-cv-03293-JMR)
(0:04-cv-03299-JMR)
(0:04-cv-03300-JMR)
(0:04-cv-03305-JMR)
(0:04-cv-03306-JMR)
(0:04-cv-03311-JMR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

BEAM, Circuit Judge, dissenting from the denial of panel rehearing and from the denial of rehearing en banc by the circuit judges of the circuit in regular active service.

The Supreme Court in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709 (2008), emphasizes two legal principles either overlooked or ignored by the panel majority (along with other well-established Supreme Court and circuit precedent discussed in my dissent in this appeal), which shortcomings now stand unreviewed by this court en banc. The Court states that "we bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits." *Id.* at 2716 (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94-95 (1998)). The Court then reminds us that "the tribal tort [like the

state common law tort asserted by the Lundeens] at issue [in *Plains Commerce Bank*] is a form of regulation," *id.* at 2721 (citing *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), a case controlling matters squarely at issue in this appeal.

I.

First, the matter of jurisdiction. A federal appellate court always faces two separate and distinct issues of jurisdiction. It must concern itself initially with the jurisdiction of the tribunal from which the appeal emerges, here the United States District Court, and then must consider its own appellate jurisdiction. District Judge Richard Kyle, pursuant to 28 U.S.C. § 1367(c)(2) and (3), had authority under the district court's supplemental jurisdiction to enter his discretionary remand order of March 9, 2005. This is because without regard to any issues of preemption, complete or defensive, the Lundeens' initial complaint was sufficient to and did allege a cause of action asserting "arising under" jurisdiction under 28 U.S.C. § 1331 based upon *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) and 49 U.S.C. § 20106. Neither party has disputed this conclusion. And, Judge Kyle's order denying the railroad federal court jurisdiction was a final judgment under 28 U.S.C. § 1291, which judgment was timely noticed for appeal to this court by Canadian Pacific (CP). Where a remand order effectively puts litigants out of federal court and leaves "nothing of the matter on the federal court's docket," it is appealable under 28 U.S.C. 1291. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996). In CP's appeal, Judge Kyle's jurisdictional order was reversed and the case was remanded to the federal district court for further proceedings.

Lundeen v. Canadian Pac. Ry., 447 F.3d 606, 615 (8th Cir. 2006) (*Lundeen I*). It is noteworthy that this panel's jurisdictional ruling was denied en banc consideration and a writ of certiorari by the Supreme Court. This court issued its Federal Rule of Appellate Procedure Rule 41 mandate on this judgment on July 27, 2006.

After remand, on February 2, 2007, District Judge James Rosenbaum filed an order on the merits of Lundeens' allegations and the district court entered judgment dismissing the complaint on February 5, 2007. This, too, was a final appealable order. Lundeens' notice of appeal was addressed to "the final judgment entered in this action on February 5, 2007." The notice did not refer to Judge Kyle's final judgment of March 9, 2005. Neither did the Lundeens in any way argue to Judge Rosenbaum that the court lacked federal subject matter jurisdiction, nor did they at any time seek a remand of the litigation to state court.

So, starting with the basics, Rule 3 of the Federal Rules of Appellate Procedure requires that Lundeens' notice of appeal "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). This rule is construed broadly. "[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier *interlocutory* orders." 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3949.4 at 72 (3d ed. 1999) (emphasis added). We will also, in certain instances, consider post-judgment motions decided after a notice of appeal has been filed, if we determine that those

judgments do not affect finality for purposes of appellate jurisdiction under § 1291. *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 669 (8th Cir. 2008). Indeed, resolution of additional post-judgment orders in those circumstances will actually advance resolution of the litigation. *Id.* at 670. In this current appeal, however, we have no prior, interlocutory orders pulled up with Judge Rosenbaum's judgment, nor did Judge Rosenbaum make any post-dismissal orders that we need to address.

Thus, under Rule 3, this panel only has appellate jurisdiction to consider the merits of Judge Rosenbaum's order and judgment and has no Rule 3 appellate jurisdiction over the jurisdictional issues fully and finally litigated before Judge Kyle and fully and finally vetted on appeal by this court. Of equal importance is the fact that the reconsideration by this panel of Judge Kyle's fully reviewed § 1291 final judgment, even had it been specifically incorporated in one form or another in the notice leading to the current appeal addressing Judge Rosenbaum's final judgment, constitutes an unprecedented and erroneous duplicate appeal of the March 9, 2005, final judgment of the district court. I can find no analog among reported federal cases for this "second-bite-of-the-apple" approach the panel majority accords the Lundeens' fully litigated jurisdictional claims. *Lundeen v. Canadian Pac. Ry.*, 532 F.3d 682 (8th Cir. 2008) (*Lundeen II*).

But, the most troubling and problematic aspect of this case as it now stands is how the panel majority purports to jump the chasm between the fully completed appeal of the March 9, 2005, final judgment and the current appeal of the February 5, 2007, final judgment and gathers unto itself authority to direct

the district court to remand Lundeens' purported state law cause of action to the Minnesota courts. And, the court majority makes no attempt to explain how it accomplishes this feat within the bounds of federal substantive and procedural law.

While the current appeal of Judge Rosenbaum's February 5, 2007, district court judgment pended, the 110th Congress amended 49 U.S.C. § 20106 (FRSA II) effective August 3, 2007, by adding new subsections (b) and (c). Armed with these changes, the majority simply states, without amplification, "if valid, [the new] subsection (c) of § 20106 effectively overrules our decision in [the completed appeal concerning Judge Kyle's March 9, 2005, final judgment]." *Lundeen II*, 532 F.3d at 688. Of course, the panel majority makes no effort to explain how this result occurs, either as a matter of appellate jurisdiction or on the merits of the Lundeens' substantive claims.

In reaching its conclusions, the court majority begins (and ends) its analysis by simply sidestepping what has actually happened in this litigation. In this regard, the majority says; when a new law is retroactive, "'an appellate court must apply that law in reviewing judgments still *on appeal* that were rendered before the law was enacted, and must alter the outcome accordingly.'" *Id.* at 689 (quoting *Plaut v. Spendthrift Farm*, 514 U.S. 211, 226 (1995)) (emphasis added). But, as I have outlined, including the Rule 3 problem, the jurisdictional issue dealt with in the March 9, 2005, order is no longer in any sense "on appeal" to this panel. Thus the panel has no jurisdiction to reach back and rewrite the result reached in the appeal of Judge Kyle's final judgment. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 227 (1995).

But, the panel opinion poses yet more onerous problems, constitutional and otherwise.

I return to the panel majority's evaluation of the effects of the amendments on the existing statute and note at the outset that, standing alone, preemption and jurisdiction are different and unrelated issues. The panel's use of the phrase "if valid" in connection with the new subsection (c), *Lundeen II*, 532 F.3d at 688, appears to refer solely to issues of constitutional validity, at least the panel majority discusses only constitutional considerations in its opinion. While I suggest that this may be an overly narrow approach by the court, as I will later explain, I nonetheless begin with the majority's above-stated contentions. Subsection (c), for our purposes says, "Nothing in this section . . . confers Federal question jurisdiction for *such State law causes of action.*" 49 U.S.C. § 20106(c) (emphasis added). To determine the intent of this italicized language in subsection (c), one must return to subsection (b) for an understanding of the reference to the words "such State law causes of action." Obviously this language refers to state law causes of action lately authorized by Congress on August 3, 2007, under subsection (b)(1)(A), (B), (C) and (2), which reads as follows:

> (b) Clarification regarding State law causes of action.—
>
> (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—
>
> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Trans-

portation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

Congress, of course, has no authority to create state law causes of action. So, the new subsection (b)(1) simply purports to penetrate and limit the preemptive thrust of the Federal Railway Safety Act, 49 U.S.C. § 20106, as it existed prior to August 3, 2007, in state law causes of action specifically enumerated in subsection (b)(2). In sum, the preemption-stripping language in (b)(1), under the clear language of (b)(2), applies to "*pending* [on August 3, 2007] State law causes of action arising from events or activities occurring on or after January 18, 2002"—the date of the Minot accident. 49 U.S.C. § 20106(b)(2) (emphasis added).

So, returning to the jurisdiction-stripping language of new subsection (c) referred to by the panel majority as its authority for reversing and remanding the March 9, 2005, Judge Kyle judgment, Congress purports to eliminate only "Federal question jurisdiction" for "pending [on August 3, 2007, the effective

date of the amendments] State law causes of action arising from events or activities occurring on or after January 18, 2002," nothing more. 49 U.S.C. § 20106(b)(2), (c).

In this context, only the "arising from events or activities occurring on or after January 18, 2002," language in the August 3, 2007, amendments asserts any retroactive intent by Congress. No words of retroactivity address or modify "pending State law causes of action" or "[f]ederal question jurisdiction." And, the preemption-limiting mandates of (b)(1) apply to pending state law causes of action docketed in either federal or state courts. For instance, it seems certain that a (b)(1) and (2)-referenced pending state law cause of action presently docketed in federal court and qualifying under diversity jurisdiction requirements, as do the Lundeens' claims, is not preempted to any greater or lesser extent than a pending state law cause docketed in state court.

The panel majority states that "[t]his 'clarifying' amendment [subsection (b)] reflected Congress's disagreement with the manner in which [this court] had interpreted [the original] § 20106 [FRSA I] to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state court lawsuit." *Lundeen II*, 532 U.S. at 688. But, this is not an accurate assessment of the amended FRSA II.

The court majority further says "Congress expressly stated [FRSA I] was not intended to confer federal question jurisdiction upon the federal courts when a party filed a state court lawsuit, as the Lundeens had done." *Id.* Of course, Congress has said no such thing.

From these statements, the panel majority, without offering a roadmap of any kind, seems to attempt to travel a circuitous, inferential, speculative and ultimately unavailing trail. The unwritten and unstated script of the panel majority appears to read as follows:

> Through subsection (b)(1) and (2) of FRSA II the 110th Congress on August 3, 2007, pierced the complete preemption veil erected by the 91st Congress on October 16, 1970, for the benefit of pending state law causes of action arising from events occurring on or after January 18, 2002. This attenuation of existing FRSA I complete preemption, supplemented by the language of subsection (c) of FRSA II, eliminated federal question and federal court jurisdiction which had been based upon the doctrine of complete preemption for those pending state law causes of action arising from occurrences or events on or after January 18, 2002. This turn of events mandates that this panel in this appeal remand the Lundeens' state law cause of action to the courts of Minnesota, from whence it came.

But, this jerry-built procedural and substantive morass falls of its own weight—for at least three reasons.

First, the amended § 20106 does not support this house of cards. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) requires that if a statute is to operate retroactively, traditional presumption teaches that it does not govern "absent clear congressional intent favoring such a result." *Id.* at 280. There is no such clear congressional intent in FRSA II. Indeed, the majority's apparent approach is the antithesis of a result reached by traveling a clearly marked path-

way. Only by indirection, inference and speculation does the panel majority reach its goal. In *Landgraf*, while that case was on appeal, as here, Congress amended § 102 of the Civil Rights Act of 1991, creating a new right to recover compensatory and punitive damages. *Id.* at 253-54. Landgraf argued remand, as do the Landeens, to allow for consideration of these new rights. *Id.* at 249. The Supreme Court rejected this contention saying that retroactive consideration of newly created rights between private parties while a matter is on appeal requires explicit and unequivocal direction from Congress and the presumption against statutory retroactivity cannot be overcome by applying general canons of statutory construction or other interpretive techniques using grammatical legerdemain or inference. *Id.* at 286.

Second, the 110th Congress's disagreement with this court's interpretation of the 91st Congress's legislative intent, if any such disagreement actually exists, is irrelevant unless the later analysis clearly and correctly interprets the earlier Congress's intent. And, that is clearly not the fact here. Initially, it is counterintuitive in the extreme to presume, as do the panel majority's statements, that the 110th Congress sitting in 2007 can accurately divine the intent of the 91st Congress acting in 1970, especially when many members of the later body were not even members of Congress or, in some instances, had not yet been born in 1970, and more especially when such newly minted intent faces rock solid legislative history to the contrary. *See* HR. Rep. No. 91-1194 (1970), 1970 U.S. Code Cong. & Adm. News 4104, 4109-10. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). This statement is even more true when it is a federal appellate court

panel that seems to have discovered this earlier legislative state of mind after the passage of thirty-seven years, and without support from either legislative language or legislative history.

Third, if, as the panel majority seems to claim, FRSA II retroactively stripped the federal courts of federal court jurisdiction based on the abolition of the doctrine of complete preemption on and after January 18, 2002, then Judge Kyle, notwithstanding ample circuit and Supreme Court precedent to the contrary, had no subject matter jurisdiction over the Lundeens' original state court claim, nor did any other federal tribunal, appellate or otherwise. And, if this is true, this panel has jurisdiction only to (a) read the statutory tea leaves, (b) determine that it lacks subject matter jurisdiction and (c) dismiss the pending case. Under this scenario, this panel has no jurisdiction to reconsider a prior appeal and affirmatively order a remand to state court or to take any other judicial action of any kind.

II.

Plains Commerce Bank's reference to *Riegel v. Medtronic* reenforces the concept that state tort actions are regulatory in nature, including state tort actions relying upon federal statutes and regulations for articulation of an applicable standard of care. 128 S. Ct. at 2721.

For pending state law claims alleging a standard of care based upon FRSA II promulgated rules, regulations and orders, the panel opinion, as earlier noted, purports to strip away the preemptive mandates of subsection (a) FRSA II on and after January 18, 2002. Since matters of intent, function and applicability of each alleged federal rule, regulation or

order require analysis and interpretation by the trial court and jury under the particular facts alleged, this circuit now has eight regulators of railway safety, the courts of the seven states of the circuit and the Secretary of the Department of Transportation. I respectfully believe that this turns federal uniformity requirements of subsection (a) on their head or, perhaps, posterior. I submit that the amended Act simply cannot be read to retroactively strip away statutorily mandated preemptions existing prior to the effective date of FRSA II, if ever.

Finally, in rejecting CP's due process arguments, the majority relies upon inapposite precedent and, even then, ignores well-established limitations. The panel says "[l]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality,'" *Lundeen II*, 532 F.3d at 689 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Using this *Usery* principle, the panel then imposes a "heavy burden" on CP to show a violation of due process rights. *Id.* at 690. Of course, the panel fails to note that *Usery* involved mostly prospective and little, if any, retroactive adjustment of private burdens and benefits. The panel cites no precedent that actually validates the retroactive creation of new private causes of action between private parties and *Landgraf*, as earlier indicated, essentially rejects such result. Indeed, in a more recent case, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy, discussing due process jurisprudence under similar circumstances, discounts the *Usery* precedent cited by the panel majority. 524 U.S. at 547 (J. Kennedy, concurring and dissenting). After noting that "'[r]etrospective laws are, indeed generally unjust; and, as has been forcibly said, neither accord with sound legislation

nor with the fundamental principles of the social compact,'" *id.* (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)), he states that "the [Supreme] Court's due process jurisprudence reflects this distrust." *Id.* He further notes that "[e]ven though prospective economic legislation carries with it the presumption of constitutionality, '[i]t does not follow . . . that what Congress can legislative prospectively it can legislative retrospectively." *Id.* at 547-48 (quoting *Usery*, 428 U.S. at 16-17) (second and third alteration in original). Under a correct due process test, justification for prospective legislation does not suffice for retroactive acts of Congress. *Id.* at 548. Accordingly, the panel majority falls well short in its published rationale for its rejection of CP's due process defense.

Recent forays by Congress into jurisdiction conferring and jurisdiction-stripping statutes provide support for CP's concerns. In *Hamdan v. Rumsfeld*, the Court concedes that a statute that takes away no substantive right but simply changes the tribunal that is to hear the case is usually not fatally problematic. 548 U.S. 557, 576-77 (2006), *superseded by statute* Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in Boumediene v. Bush*, 128 S. Ct. 2229 (2008). But, when jurisdiction stripping is coupled with dissipation of substantive rights, as, for instance, when established preemption defenses are taken away from a railroad, due process protections demand a different outcome. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).

III.

Whether we deal with the panel majority's conclusions as a matter of statutory analysis or constitu-

tional adjudication, this case raises important and troubling issues several of which are wrongly decided by the panel and are now rejected for review by the court en banc. In my view, such result portends serious consequences for this and other litigation involving America's railroads. As things now stand, the panel decision reads the "national uniformity" provisions of subsection (a) of § 20106 out of the FRSA and provides the real possibility of subjecting matters of railway safety to fifty state regulators while dangerously reducing the federal government's oversight of railway accident monitoring and prevention.

Thus, I dissent from the court's refusal to consider the important issues in this case en banc. In the absence of circuit review, it is my hope that the Supreme Court may find it appropriate to consider the untoward ramifications of this decision, assuming CP requests it do so.

October 10, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Nos. 05-1918, 05-1920, 05-1922, 05-1923, 05-1924, 05-1925, 05-1926, 05-1927, 05-1928, 05-1929, 05-1930, 05-1931, 05-1932, 05-1933, 05-1934, 05-1935, 05-1936, 05-1937, 05-1938, 05-1939, 05-1940, 05-1941, 05-1942, 05-1943, 05-1944, 05-1945, 05-1946, 05-1947, 05-1948, 05-1949, 05-1950.

TOM LUNDEEN, individually; NANETTE LUNDEEN, and as parents and natural guardians of MOLLY LUNDEEN, a minor, and MICHAEL LUNDEEN,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD., Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

JOHN SALLING, individually; LORENDA POISSANT SALLING, individually, and on behalf of, and as parent and natural guardian of SEBASTIAN POISSANT, a minor,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

DION DARVEAUX, individually, on behalf of, and as parent and natural guardian of KENDALL DARVEAUX, a minor; BRENDA DARVEAUX, individually, on behalf of, and as a parent and natural guardian of KENDALL DARVEAUX, a minor,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

LARRY SCHAFER, individually, and on behalf of, and as parent and natural guardian of JENNA SCHAFER, a minor; TAMI SCHAFER, individually, and on behalf of, and as parent and natural guardian of JENNA SCHAFER, a minor,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

GERALD WICKMAN,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

CHARLES SWENSON; SANDRA SWENSON,
Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

REBECCA BEHNKIE, individually, and on behalf of, and as parent and natural guardian of NATHANIEL BEHNKIE, a minor,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

MARILYN CARLSON,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

LARRY CRABBE; CAROL CRABBE,
Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

WILFRED DAHLY; GERALDINE DAHLY,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

DENISE DUCHSHERER; LEO DUCHSHERER; JOSHUA DUCHSHERER,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

JUDY DEUTSCH, individually, and on behalf of, and as natural guardian of TYRONE DEUTSCH, a minor,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

JO ANN FLICK,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

LEO GLEASON,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

CHARLOTTE GOERNDT,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,
Defendants-Appellants.

MARY BETH GROSS, individually, and on behalf of, and as parent and natural guardian of BRETT GROSS, a minor,
Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

DARLA M. JUST,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

IRENE CLORE KORGEL,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

RICHARD MCBRIDE; LINDA MCBRIDE,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

RICHARD MUHLBRADT,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

LONNIE SHIGLEY,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

BOBBY SMITH; MARY SMITH,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

RACHELLE TODOSICHUK,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

SHELLY HINGST,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued AS CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

NATHAN FREEMAN, individually, and on behalf of, and as parents and natural guardians of ASHLYN FREEMAN, a minor; NICOLE FREEMAN, individually, and on behalf of, and as parents and natural guardians of ASHLYN FREEMAN, a minor

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

DOUG WELTZIN,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

MELISSA TODD,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

RAY LAKODUK,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

TRENT WESTMEYER; RANDI LOU WESTMEYER,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

LEROY SLORBY,

Plaintiff-Appellee,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

MARK NISBET; SANDRA NISBET,

Plaintiffs-Appellees,

v.

CANADIAN PACIFIC RAILWAY COMPANY; CANADIAN PACIFIC LTD, Sued as CANADIAN PACIFIC LIMITED; CANADIAN PACIFIC RAILWAY LIMITED; SOO LINE RAILROAD COMPANY,

Defendants-Appellants.

Submitted: Oct. 14, 2005
Filed: May 16, 2006.

Before BYE, BEAM, and SMITH, Circuit Judges.

BYE, Circuit Judge.

Canadian Pacific Railway Company (CP Rail) appeals the district court's orders allowing the Lundeens to amend their complaint and remanding the case to state court. We reverse and remand.

I

This action was originally filed by the Lundeens against CP Rail in Minnesota state court. They sued for personal injuries and property damages suffered as a result of a CP Rail freight train derailment in North Dakota. CP Rail removed to the United States District Court for the District of Minnesota based on federal question jurisdiction. The Lundeens amended their complaint in an attempt to remove the federal question. The district court declined to exercise its discretionary jurisdiction over what it construed to be remaining state law claims and remanded to state court. CP Rail appealed, challenging the order allowing the Lundeens to amend their complaint and the remand as improper forum shopping. Regardless of the merits of the forum-shopping argument, we note the amended complaint continues to claim, among other things, CP Rail negligently inspected their

tracks as shown by failing to comply with the rules and regulations of the Federal Railroad Administration (FRA), and we thus hold the district court continues to have jurisdiction through complete preemption of the state law claim of negligent inspection.

II

A question of subject-matter jurisdiction may be raised sua sponte at any time. *Long v. Area Manager, Bureau of Reclamation,* 236 F.3d 910, 916 (8th Cir.2001) (citation omitted). Generally, a plaintiff can avoid removal to federal court by alleging only state law claims. *Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 542 (8th Cir.1996) (citing *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)). However, there are exceptions to this general rule. One basis for removal is federal question jurisdiction. *See* 28 U.S.C. § 1441. A federal question is raised in "those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) (emphasis added). Additionally "complete" preemption is an exception to the well-pleaded complaint rule and, unlike preemption as a defense, is a basis for federal jurisdiction. *Gaming Corp.,* 88 F.3d at 543.

Congressional intent is the "ultimate touchstone" guiding preemption analysis. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (citations omitted). "If the statute contains an express preemption clause, then the statutory con-

struction should center on its plain meaning as the best evidence of Congress's preemptive intent." *Peters v. Union Pac. R.R.*, 80 F.3d 257, 261 (8th Cir.1996). Here, the Lundeens assert in part CP Rail negligently inspected railroad tracks, so we look to the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101 et. seq., and the extent to which relevant regulations adopted pursuant to it address negligent track inspection.

The preemptive effect of the FRSA is specified in 49 U.S.C. § 20106[1]:

> Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;

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[1] Although the current version of the FRSA's preemption clause is worded slightly differently from the original version, we have noted the two versions are "identical in substance." *Cearley v. Gen. Am. Transp. Corp.*, 186 F.3d 887, 890 n. 5 (8th Cir.1999).

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

On the one hand, Congress created the FRSA to ensure railroad safety would be "nationally uniform to the extent practicable" and "'[t]hese statutory provisions evince . . . a 'total preemptive intent.'" *Peters,* 80 F.3d at 262 (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman,* 542 F.2d 11, 13 (3d Cir.1976)). On the other hand, the preemption provision is "'employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses.'" *Chapman v. Lab One,* 390 F.3d 620, 626-27 (8th Cir.2004) (quoting *CSX Transp. v. Easterwood,* 507 U.S. 658, 665, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)).

This circuit has addressed complete preemption in the context of the FRSA on two occasions: *Chapman* and *Peters.* In *Peters* we found complete preemption: "Congress has expressly preempted state laws affecting railroad safety where the Secretary of Transportation has promulgated regulations," as confirmed by "[t]he FRSA regulations explicitly set[ting] out a comprehensive administrative adjudication system for handling certification disputes," which "directly apply to Peters' [state law] conversion claim."[2] 80

[2] The administrative adjudication is described as:

> Pursuant to § 434, the Secretary of Transportation issued preemptive regulations concerning engineer certification. Included in these regulations is a specific, detailed scheme setting out dispute resolution procedures. The regulations establish a review board to consider petitions challenging a

F.3d at 262. Thus, we held, "[a]ny issue raised in this area is a federal issue justifying removal." *Id.* In *Chapman,* however, we found no preemption as to common-law claims arising from alleged deficient performance in the drug testing process because "the applicable statute and regulations concerning drug testing do not establish an intent to preempt the substantive common law at issue," where the FRA's drug testing regulations included an anti-waiver provision.[3] 390 F.3d at 628-29. Because we found no preemption, we reasoned there was thus no complete preemption. *Id.* at 629.[4] We distinguished *Peters* by

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railroad's denial of certification or recertification, or revocation of certification. Any person denied certification can petition the Locomotive Engineer Review Board (Board) to determine whether the denial was improper. Any party adversely affected by the Board's decision has a right of appeal. This "comprehensive remedial scheme . . . serves to confirm [the FRSA's] preemptive scope."

Peters, 80 F.3d at 261 (quoting *Rayner v. Smirl,* 873 F.2d 60, 65 (4th Cir.1989)) (citations omitted).

[3] The anti-waiver provision reads:

> An employee required to participate in body fluid testing . . . shall . . . evidence consent to taking of samples . . . . The employee is not required to execute any document or clause waiving rights that the employee would otherwise have against the employer, and any such waiver is void. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.

Department of Transportation Alcohol/Drug Regulations, 54 Fed.Reg. 53,261 (Dec. 27, 1989); *see also* 49 C.F.R. 219.11(d) (1989).

[4] We also noted the FRSA does not "provide[ ] a private right of action for a person aggrieved by negligence in the analysis of a drug test, and the absence of an alternative cause of action

noting: "[u]nlike the drug testing regulations, the rules at issue in *Peters* did not contain a provision that could be construed as a savings clause through which the Secretary preserved state common-law claims," and in *Peters* "the comprehensive administrative adjudication system for handling certification disputes . . . influenced our court's complete preemption analysis." *Id.* at 628, 630.

Given that the FRSA preemption clauses are substantively identical in *Peters* and *Chapman,* and our finding complete preemption in the former but not the latter by distinguishing the regulations at issue in the cases, complete preemption turns first on the Secretary of Transportation's regulations "covering the subject matter of the State Requirement" and then any given regulation's solicitude for state law. *See* 49 U.S.C. § 20106. Again, for example, the drug-testing regulations at issue in *Chapman* contained an anti-waiver provision which displayed a "solicitude

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militates against a finding of complete preemption." 390 F.3d at 629. However, our statement was dicta in light of our holding earlier in the opinion there was no complete preemption because not even regular preemption lay. *Id.* at 629. Compare *Gaming Corp.*, 88 F.3d at 547, which stated:

> The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 391 n. 4, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, *see M. Nahas & Co., Inc. v. First National Bank of Hot Springs,* 930 F.2d 608, 612 (8th Cir.1991), the intent of Congress is what controls. *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 45, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (citations omitted).

for state common law distinguish[ing it] . . . from the [regulations establishing a] comprehensive administrative adjudication system for handling certification disputes that influenced our court's complete preemption analysis in *Peters*." 390 F.3d at 630.

In this case, the Lundeens bring claims based in part on negligent inspection of railroad track. FRSA track inspection regulations lack the solicitude for state law demonstrated by the anti-waiver clause in *Chapman*. This situation is more akin to our discussion in *In re Derailment Cases*, 416 F.3d 787 (8th Cir.2005), involving inspection of railroad freight cars. We found preemption where:

> The FRA has adopted regulations that require inspections of freight cars at each location where they are placed in a train. Railroads must designate inspectors who "have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the [FRA regulations]." The FRA's regulations specify that a railroad may not place or continue in service a car that, inter alia, has a defective coupler or a defective draft key retainer assembly.
>
> The regulations also establish a "national railroad safety program" intended "to promote safety in all areas of railroad operations in order to reduce deaths, injuries and damage to property resulting from railroad accidents." Federal and state inspectors "determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision." Inspectors visit rail yards to ensure compliance with the regulations and railroads face civil penalties for violations. . . .

> . . . It is clear that the FRA's regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime. These intentions are buttressed by the FRA's inspection manual for federal and state inspectors. Further, there is no indication that the FRA meant to leave open a state tort cause of action to deter negligent inspection. . . . Accordingly, we conclude that Plaintiffs' negligent inspection claims are preempted by the FRA's regulations.

In re Derailment Cases, 416 F.3d at 793-794 (citations and footnotes omitted). We distinguished *Chapman* by noting the regulations there "specifically contemplate[d] the existence of a common-law cause of action for negligence." *Id.* at 794.

Similarly, federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

We note the FRSA's preemption clause is employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses, and we also note *In re Derailment* was a conflict rather than complete preemption case. Nonetheless, where we find the Lundeens' negligent inspection claims preempted following the logic in *In Re Derailment* and where it is both clear the regulations at issue are intended to prevent negligent track inspection nationally and contain no savings clause (so there is thus no indication the FRA meant to leave open a state law cause of action), absent en banc review we are bound by our decision in *Peters* to find complete, jurisdictional, preemption. The district court therefore has subject-matter jurisdiction in the instant case and improperly remanded the case to state court.

III

Based on the foregoing, this case is reversed and remanded for proceedings consistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-1918+

TOM LUNDEEN, et al.,
Appellees,

v.

CANADIAN PACIFIC RAILWAY CO., etc., et al.,
Appellants.

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

(5128-010199)

July 18, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 06-528

TOM LUNDEEN, et al.,

Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, et al.

Jan. 22, 2007.

Case below, 447 F.3d 606.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

APPENDIX F

UNITED STATES DISTRICT COURT,
D. MINNESOTA.

No. 04-CV-3220 (JMR/FLN).

TOM LUNDEEN et al.

v.

CANADIAN PACIFIC RAILWAY COMPANY et al.

Feb. 2, 2007.

ORDER

JAMES M. ROSENBAUM, Chief Judge.

This case, and thirty other related cases,[1] arises out of a train derailment which occurred on January 18, 2002, near Minot, North Dakota. Defendants ask the Court to dismiss these cases pursuant to Rule 12(c) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") claiming federal preemption bars plaintiffs' state law negligence claims. Plaintiffs ask the Court to stay its hand until the Eighth Circuit Court of Appeals has issued a ruling on a similar motion in another case arising from this incident. Plaintiffs' motion is denied; defendants' motion is granted.

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[1] Consistent with the District Court Order issued August 16, 2004, and the Eighth Circuit's consolidation of this litigation on appeal, this Order applies equally to the thirty related cases identified in the attached Addendum.

I. *Factual and Procedural Background*[2]

In the early morning hours of January 18, 2002, a freight train owned and operated by defendants (collectively referred to as "CP Rail") derailed near a residential neighborhood just beyond the city limits of Minot, North Dakota. During the derailment, five tank cars released more than 220,000 gallons of anhydrous ammonia. The resulting anhydrous ammonia cloud released toxic gas into the environment. Many of those exposed to the gas suffered burning of moist tissue such as the eyes, throat, and lungs. One person died as a result of the vapor plume; 11 people sustained serious injuries; and 322 people sustained major injuries. Plaintiffs are among those injured by the release of the toxic gas.

At the time of the accident, the train was traveling on continuous welded rail ("CWR") track. When CWR track is damaged, it is replaced with "plug rail," which is attached to the original rail by joint bars.

The National Transportation Safety Board ("NTSB") investigated the derailment and found fractures in the joint bars at the east end of the plug rail. The Board further found that these fractures caused the rail itself to break away, leading to the derailment. The NTSB's Railroad Accident Report found the probable cause of the accident to be "an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint." Track Safety Standards; Inspections of Joints in Continuous

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[2] For purposes of this Opinion, those facts upon which the parties do not agree have been considered in the light most favorable to plaintiffs.

Welded Rail (CWR), 71 Fed.Reg. 59677, 59678-79 (Oct. 11, 2006) (quoting NTSB Railroad Accident Report: Derailment of Canadian Pacific Railway Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota, January 18, 2002 (NTSB/RAR-04-01) (March 9, 2004)).

Exposure to anhydrous ammonia led plaintiffs, along with hundreds of other Minot residents, to file lawsuits against CP Rail in Minnesota state court for personal injuries and property damages. Plaintiffs' original complaint alleged that CP Rail had violated "United States law." Citing this assertion, CP Rail removed the cases to federal court on July 15, 2004, claiming federal question jurisdiction pursuant to 28 U.S.C. § 1441(a) & (b). Soon thereafter, plaintiffs moved for remand to state court. Their motion was denied on October 26, 2004, by the district court, which found it had federal jurisdiction. Plaintiffs, thereafter, attempted to eliminate the federal question by amending their complaint, deleting any claim for violations of "United States law."

After this amendment, the district court remanded the cases to state court by Order dated March 9, 2005. CP Rail appealed the remand to the Eighth Circuit Court of Appeals.[3] The Eighth Circuit reversed, holding that, notwithstanding plaintiffs' amendment, the district court retained jurisdiction because federal law completely preempts state law claims of negligent inspection. *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 613-15 (8th Cir.2006). The appellate court remanded the cases for further

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[3] While the appeal was pending, however, these cases proceeded to discovery, and some were scheduled for trial in state court.

proceedings pursuant to its rulings. *Id.* at 615. Plaintiffs sought a Writ of Certiorari to the U.S. Supreme Court, which was denied on January 22, 2007. *Lundeen v. Canadian Pac. Ry. Co.*, --- U.S. ----, 127 S.Ct. 1149, 166 L.Ed.2d 993. Plaintiffs' previous request for a stay pending Supreme Court review is now moot.

As a result, the Court now considers plaintiffs' remanded negligence claims, which fall into four categories: (1) negligent inspections; (2) negligent construction and maintenance; (3) negligent hiring and training; and (4) negligent operation. CP Rail seeks summary judgment, asserting each claim is preempted by the Federal Railroad Safety Act ("FRSA") and its attendant regulations.

II. *Analysis*

A. *Motion to Stay—Further Procedural Issues*

Plaintiffs ask this Court to abstain from deciding CP Rail's motion to dismiss pending the outcome an appeal of an order dismissing a related North Dakota case, *Mehl v. Canadian Pac. Ry. Ltd.*, 417 F.Supp.2d 1104 (D.N.D.2006), which is pending in the Eighth Circuit Court of Appeals. There, the district court found federal preemption, and dismissed numerous claims arising from the same derailment.

The Court declines the invitation to stay its hand. It is not for this Court to conjecture about the outcome of the *Mehl* case. Whatever other matters are underway in the empyrean, the Eighth Circuit has remanded these cases to this Court for further proceedings in accord with its decision. *Lundeen*, 447 F.3d at 615. Accordingly, this Court will do as directed to comply with the mandate. Plaintiffs' motion to stay is denied.

B. *Judgment on the Pleadings*

CP Rail has moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). When considering such a motion, a court applies the same standard as in a 12(b)(6) motion for failure to state a claim. *St. Paul Ramsey County Med. Ctr. v. Pennington County, South Dakota*, 857 F.2d 1185, 1187 (8th Cir.1988). The court accepts as true all facts pleaded by the non-moving party, granting all reasonable inferences in its favor. *United States v. Any and all Radio Station Transmission Equip.*, 207 F.3d 458, 462 (8th Cir.2000). A court may only grant a motion for judgment on the pleadings when the moving party clearly establishes that no material issue of fact remains to be resolved, and it is entitled to judgment as a matter of law. *Id.*; Fed.R.Civ.P. 12(c).

C. *Preemption*

Federal preemption derives from the Supremacy Clause of the United States Constitution. The Constitution establishes the laws of the United States as "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, any state law which conflicts with federal laws or regulations is preempted. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

When Congress enacted the FRSA, it directed the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103. The Secretary delegated authority to "[c]arry out the functions vested in the Secretary by the [FRSA]" to the Federal Railroad Administration ("FRA"). 49 C.F.R. § 1.49(m). The FRA has done so by

establishing a "national railroad safety program . . . to promote safety in all areas of railroad operations in order to reduce deaths, injuries and damage to property resulting from railroad accidents." *Id.* at § 212.101(a). To assure that railway safety is "nationally uniform to the extent practicable," Congress wrote into the FRSA an explicit preemption clause whereby states retain authority to regulate railroad safety, but only "until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. Once the Secretary of Transportation has done so, state law is pre-empted.

The United States Supreme Court has made this clear. It held that regulations adopted pursuant to the FRSA preempt state law tort claims if they cover—or "substantially subsume"—the subject matter of the relevant state law. *Easterwood*, 507 U.S. at 664, 113 S.Ct. 1732. The Eighth Circuit Court of Appeals also deems coverage to be preemption's touchstone. *In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir.2005) (hereinafter *Scottsbluff*). State tort laws are preempted whenever federal regulations, adopted pursuant to the FRSA, address the same subject matter. *Id.*

In the face of this established law, plaintiffs advance three arguments against FRSA preemption in this case. First, they assert their claims arise from subject matters which are not covered by FRA regulations. They deny that inspection and maintenance of CWR track is covered by the FRSA and its attendant Federal Regulations. Next, they claim that only state tort claims imposing additional or more stringent duties are federally preempted. Finally, they seek

shelter in the FRSA's Safe Harbor provision, which provides an exception to preemption for state laws addressing a local safety hazard. Each argument fails.

1. *"Covered" Claims*

Plaintiffs allege the Minot derailment was chiefly caused by CP Rail's ineffective and inadequate inspection and maintenance program. They claim CP Rail "failed to identify or replace cracked joint bars [in CWR] before those joint bars completely fractured." (Am.Compl.¶ XVII.) According to plaintiffs, because their claims relate to inspection and maintenance of a specific type of track—CWR, as opposed to bolted track—they are not covered by any FRA regulations. Beyond this, they argue that regulations which do cover CWR are too general for preemption purposes.

The principal regulatory provision addressing CWR is 49 C.F.R. § 213.119. Under that section, railways using CWR are to adopt internal procedures regarding safety concerns specific to CWR. The regulations in effect when the accident occurred required each owner of CWR track to "have in effect and comply with written procedures which address the installation, adjustment, maintenance and inspection of CWR, and a training program for the application of those procedures." 49 C.F.R. § 213.119 (1998). The FRA, in turn, is to review each railroad's plan to ensure it addresses certain safety issues and monitors compliance with the procedures. *Id.*

In determining the most effective way to regulate CWR, the FRA concluded that:

> consistent methodology is not as important as effective methodology in installing and maintain-

> ing CWR. Therefore . . . § 231.119 [is] premised on the concept that the regulations should provide railroads with as much flexibility as safely feasible.

Track Safety Standards, 63 Fed.Reg. 33992, 33994 (Jun. 22, 1998). According to the FRA, amendments to its Track Safety Standards, including § 231.119, "present additional regulatory requirements . . . to improve track safety and provide the railroad industry with the flexibility needed to effect a safer and more efficient use of resources." *Id.* at 33992.

Plaintiffs claim these regulatory requirements are not specific enough to give them preemptive effect, because the FRA delegated to the railroads the task of developing internal procedures for inspection and maintenance of CWR. Plaintiffs claim FRSA preemption does not apply when the FRA has directed railroads to implement internal plans covering defined safety issues, even where the FRA has identified the specific safety issues to be addressed. In other words, plaintiffs would require the FRA itself to specify the exact procedures a railroad must impose before federal preemption attaches. The Court disagrees.

The FRSA preempts all claims arising from "covered" subject matters. 49 U.S.C. § 20106. The "subject matter" of a claim is "the safety concern[ ] that the state law addresses." *Burlington N. Ry. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir.1999). *Easterwood* makes clear that, to "cover the subject matter," the regulation must "substantially subsume" the subject matter of the state law, not merely "touch upon" or "relate to" it. 507 U.S. at 664, 113 S.Ct. 1732. But a federal regulation may substantially subsume a particular subject matter when the FRA

examines a safety concern and affirmatively determines its goals will best be achieved by issuing a regulation directing railroads to develop a plan to address the concern, thus granting them the flexibility to adjust specific requirements to their individual circumstances. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 671-72 (D.C.Cir.2005). This principle applies here.

The FRA considered the best way to address CWR safety issues. *See* 63 Fed.Reg. at 33993-94. In doing so, it established a research program to develop criteria and guidelines for regulating CWR, and concluded the best approach was to identify the basic safety issues and "allow railroads to develop and implement their individual CWR programs based on procedures which have proven effective for them over the years." *Id.* at 33994. The FRA's reliance on railroad expertise does not negate the fact that the resulting regulations cover the subject matter of the inspections and maintenance of CWR. Plaintiffs do not, primarily, deny that the 1998's version of § 213.119 failed to cover CWR inspections and maintenance; instead, they assert that in deferring to the railroads, the FRA's regulatory efforts were inadequate.

This argument fails because "[t]he FRSA provision, however, authorizes the court *only* to determine whether the regulation covers the subject matter. . . . Neither the court nor the [litigant] is authorized or equipped to measure off the adequacy of [the] agency's strategic determinations." *Williams*, 406 F.3d at 672 (emphasis in original). Thus, plaintiffs' argument that § 213.119 was inadequate to prevent the Minot derailment is irrelevant; the regulation undoubtedly covers CWR.

Plaintiffs' second effort to avoid § 213.119 preemption also fails. They argue the regulation does not apply in this case, because its precondition—the railroad's development of procedures to maintain and repair CWR—had not been completed. This argument derives from the fact that, at the time of the accident, CP Rail had not submitted its internal procedures concerning CWR track inspection to the FRA pursuant to § 213.119. This argument is simply a noncompliance claim disguised as one for failure to satisfy a "precondition." Even assuming that failing to submit internal railroad procedures on time does not fulfill a "precondition," plaintiffs' argument does not succeed. The question of whether CP Rail failed to comply with § 213.119 is irrelevant. Neither the United States Supreme Court nor the Eighth Circuit Court of Appeals requires a railroad to prove FRA compliance before allowing state law preemption. Both Courts deem coverage, rather than compliance, to be preemption's touchstone. "It is this displacement of state law concerning the [subject matter], and not . . . adherence to the [federal] standard . . . that pre-empts state tort actions." *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 357-58, 120 S.Ct. 1467, 146 L.Ed.2d 374 (2000); *accord Lundeen*, 447 F.3d at 611 (finding complete preemption of negligent inspection claims, despite plaintiffs' claim that the railroad failed to comply with FRA regulations).

Plaintiffs offer *Easterwood's* analysis of 23 C.F.R. § 646.214(b) to support their argument. Their reliance on *Easterwood* is misplaced. Section 646.214(b), considered in *Easterwood*, regulates railroad crossing devices paid for with federal funds. *Easterwood* holds that, because § 646.214(b) applies only when federal funds "participate in the installation" of railroad crossing devices, the section does not apply when the

federal funding precondition has not been met. 507 U.S. at 671-73, 113 S.Ct. 1732. Section 646.214(b)'s federal funding precondition is explicit; its standards apply "where federal funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i). This explicit precondition "covers"—and preempts—state law claims only after the crossing devices have been installed and federal funds expended.

This must be contrasted to Part 213 regulations, including § 213.119, which prescribe "the mere issuance of these regulations preempts any State law, regulation, or order covering the same subject matter." 49 C.F.R. § 213.2. Thus, there are no preconditions for coverage or preemption in § 213.119.

Ultimately then, preemption turns on whether FRA regulations substantially subsume plaintiffs' negligence claims, regardless of CP Rail's compliance. *See Scottsbluff*, 416 F.3d at 793; *Mayor & City Council of Baltimore v. CSX Transp., Inc.*, 404 F.Supp.2d 869 (D.Md.2005). The regulations need not spell out every detail or "impose bureaucratic micromanagement in order to substantially subsume a particular subject matter." *Scottsbluff*, 416 F.3d at 794. Thus, the ultimate question is whether the FRA regulations cover the subject matter of plaintiffs' negligence claims, and they do.

2. *Negligent Inspections*

The Eighth Circuit has ruled in this very case that plaintiffs' negligent inspection claims are preempted by numerous FRA regulations. *Lundeen*, 447 F.3d at 614. As stated by the Court, "It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action." *Id.* One

might think this would conclude the inquiry. *See Lamb Eng'g & Constr. Co. v. Neb. Pub. Power Dist.*, 145 F.3d 996, 998 (8th Cir.1998) ("Under the law of the case doctrine, the district court was bound on remand to obey the Eighth Circuit's mandate and not to re-examine issues already settled by our prior panel opinion.").

The Eighth Circuit's declaration and its issued mandate have not, however, deterred plaintiffs. They now assert the *Lundeen* court's preemption analysis is inapplicable, because that court analyzed plaintiffs' claims using the doctrine of complete—as opposed to defensive—preemption. Plaintiffs may not, however, cling to this reed: in reaching its conclusion, the *Lundeen* court relied on the *Scottsbluff* decision, and *Scottsbluff* was a defensive preemption case. *Lundeen*, 447 F.3d at 614 (recognizing *Scottsbluff* as being a conflict rather than complete preemption case).

Plaintiffs continue their attack on the Eighth Circuit's treatment of this case by suggesting the appellate court misapprehended the matter altogether, because *Lundeen's* reliance on *Scottsbluff* was misplaced in the first place. They ask this Court to find that the Court of Appeals was confused, because Scottsbluff was a bolted rail case, as opposed to a CWR case. They argue that if the Lundeen court would have had the benefit of the FRA's recent amendment to § 213.119, the appellate judges would have realized that inspections of CWR joints were not covered by the regulations when the accident occurred. This Court declines the invitation to sit in review of the Court of Appeals.

It is true that, effective October 31, 2006, the FRA amended § 213.119 to improve inspection of CRW joints. The amended regulation aims to improve iden-

tification of cracks in rail joint bars. 71 Fed.Reg. at 59677. The new rule specifies numerous new requirements for CWR joint inspection. Plaintiffs claim the amended regulations prove that the subject matter of CWR joint inspection was not covered in the 1998 regulations. The argument fails because, if it were accepted, it would eviscerate any regulatory scheme which allows its standards to be updated, and hopefully improved. Under plaintiffs' view of the federal regulations, any amendments would essentially declare the prior standards invalid, and show they failed to deal with the later clarified regulatory goal.

The Court finds the FRA's decision to bolster its CWR joint inspection regulations is in no way equivalent to a determination that the regulations had not previously covered such inspections. Plaintiffs overlook the Eighth Circuit's recognition that train inspections fall squarely in the midst of multiple FRA regulations:

> federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B.

Lundeen, 447 F.3d at 614.

The inspection regime in effect when the Minot derailment occurred regulated all railroads. As the

FRA confirmed, prior to promulgating the amended § 213.119, "[t]rack owners were required to simply address joints in CWR in the same manner as they addressed joints in conventional jointed rail. *See* 49 C.F.R. § 213.121." 71 Fed.Reg. at 59579. Thus, *Lundeen* and *Scottsbluff's* analysis controls: plaintiffs' negligent inspection claims are preempted by the FRSA.

3. *Negligent Construction and Maintenance*

Plaintiffs recognize the numerous FRA regulations governing track construction and maintenance. (Pl.'s br. at 28.) General track maintenance requirements are set forth at 49 C.F.R. 213.103-213.143. "The issues of bolt tightness, cracked joint bars, restressing, adjusting or destressing as to CWR rail, rail anchoring, and defective track conditions are all covered by federal regulations." *Mehl*, 417 F.Supp.2d at 1116-17 (citing 49 C.F.R. §§ 213.113, 213.115, 213.119, 213.119(b), 213.121(a), 213.121(b), 213.121(c), and 213.121(f)). Finally, as discussed above, § 213.119 directs CWR owners to include procedures for the maintenance of tracks in their internal plans.

Faced with these regulations, plaintiffs would still deny preemption by suggesting these are merely general regulations which fail to address their claims that CP Rail was negligent in maintaining its CWR track. For example, plaintiffs point to the lack of requirements for bolts or adequate lubrication of joints. Such cavils are unavailing when the Court considers that § 213.121 addresses how joint bars should be secured to rail, including the issue of bolt tightness. Claims that replacement of CWR and temporary joints are similarly unaddressed are unfounded; §§ 213.113 and 213.115 address defective track, and § 213.121 covers joint replacement. Plain-

tiffs' assertion that the regulations do not address anchor maintenance is incorrect in light of § 213.119(b)'s requirement of written procedures addressing this precise question.

This argument ultimately fails, however, because the Eighth Circuit has rejected such nit-picking. The Court has recognized that FRA regulations need not impose bureaucratic micromanagement over a subject area in order to preempt state claims. *Scottsbluff*, 416 F.3d at 794. Plaintiffs' construction and maintenance issues are covered by multiple regulations; thus, the Court finds these claims are federally preempted.

4. *Negligent Hiring and Supervision*

The issues of supervising and hiring railroad employees are also covered. Section 213.119(h) requires CWR rail owners to develop internal plans for training employees who inspect and maintain CWR. In addition, rail owners are required to "instruct each . . . employee on the meaning and application of the railroad's operating rules" under § 217.11(a).

Federal regulations cover minimum experience and education requirements for supervisory track maintenance workers and for employees who conduct inspections. 49 C.F.R. § 213.7(a) & (b). Plaintiffs, however, deny that rail employee hiring is substantially subsumed by this regulation for an alleged failure to prescribe qualifications for employees who actually maintain or install tracks. Here again, the Eighth Circuit has found that the FRA's regulations need not delineate in minute detail each action a railroad must take, so long as the regulations cover the subject matter. *See Scottsbluff*, 416 F.3d at 794. The FRA regulations cover the subjects of employee

supervision and hiring; plaintiffs' claims are therefore preempted.

5. *Negligent Operation*

Plaintiffs assert CP Rail's negligence in operating its train at an unsafe speed. This claim is clearly preempted. In *Easterwood*, the Supreme Court found excessive speed claims preempted by 49 C.F.R. § 213.9, which "establishes maximum train speeds." 507 U.S. at 675, 113 S.Ct. 1732. Also, under § 213.119(e), owners of CWR must develop internal "procedures which control train speed on CWR track" in various situations.

Similarly, plaintiffs' claim that CP Rail negligently transported hazardous materials falls in the face of an extensive federal regulatory scheme. *See Mehl*, 417 F.Supp.2d at 1117-18 (citing 49 C.F.R. §§ 172.101, 173.314, 173.315, and 174.200); *see also* 49 C.F.R. §§ 174.61, 174.67, & 174.204. These claims cannot survive preemption.

6. *Additional or More Stringent Requirements*

Plaintiffs' blunderbuss attacks continue. They argue that, even where federal regulations do cover a particular subject, they may assert claims in accord with those regulations. Thus, they deny their tort claims premised on CP Rail's alleged failure to comply with federal regulations are preempted, and instead argue their claims merely parallel duties imposed by federal regulation. According to plaintiffs, only additional or more stringent state requirements are preempted. These claims fail in light of the applicable standard for FRSA preemption.

The words of the FRSA's preemption clause are clear: a state may regulate only "until the Secretary

of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. Once a federal regulation covers the subject matter of a state claim, that claim is preempted.

Plaintiffs offer Supreme Court decisions where additional or more stringent state law duties have been preempted. *See Easterwood*, 507 U.S. at 674-75, 113 S.Ct. 1732; *Shanklin*, 529 U.S. at 354-55, 120 S.Ct. 1467. But neither case considers whether a claim premised on the same standard as the federal regulation survives preemption. Plaintiffs have failed to provide any binding case law which supports their proposition that parallel claims may go forward. And they cannot do so because coverage remains preemption's touchstone.

The Supreme Court in *Shanklin* held that, when federal coverage is present, it is the displacement of state law, rather than compliance with federal regulatory standards, which determines whether state laws are preempted. *Id.* at 357-58, 120 S.Ct. 1467. The Circuits are in accord. *See, e.g., Doyle*, 186 F.3d at 796 ("[§ 20106] does not distinguish between contradictory state requirements and merely duplicative state requirements."); *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 747 (7th Cir.2005) (state claims premised upon failure to comply with federal regulations do not survive preemption); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 645 (5th Cir.2005) (same).

Preemption bars private claims for FRA violations. Congress has given the Secretary of Transportation "exclusive authority" to impose civil penalties and request injunctions for violations of the railroad

safety regulations.[4] 49 U.S.C. § 20111(a); *Abate v. S. Pac. Transp. Co.*, 928 F.2d 167, 170 (5th Cir.1991) ("The structure of the FRSA indicates that Congress intended to give federal agencies, not private persons, the sole power of enforcement.").

Indeed, the FRSA has "absolved railroads from any common law liability for failure to comply with the safety regulations." *Mehl*, 417 F.Supp.2d at 1120. This is the regulatory scheme which Congress has imposed. And when Congress has clearly spoken, any relief from its regime must come from Congress rather than the Courts. Private actions against railroads based on federal regulations are preempted.

7. *Local Safety Hazard Exception*

Plaintiffs' last effort to deny preemption is an appeal to the FRSA's Safe Harbor Provision. Congress placed a savings clause into the FSRA regulatory scheme. This provision permits a state to enact a more stringent law when "necessary to eliminate or reduce an essentially local safety or security hazard," so long as the law is "not incompatible with a law, regulation, or order of the United States Government," and does "not unreasonably burden interstate commerce." 49 U.S.C. § 20106. Here the last gasp dies: Courts have consistently found this section applies only "when local situations are 'not capable of being adequately encompassed within uniform national standards.'" *Williams*, 406 F.3d at 672 (quoting *Norfolk & Western Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 926 F.2d 567, 571 (6th Cir.1991)); *Nat'l Ass'n of*

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[4] The single exception to the Secretary's exclusive authority exists when the federal government fails to act promptly. In such cases, state government agencies can file suit, impose penalties, or seek injunctions. 49 U.S.C. § 20113.

Regulatory Util. Comm'rs v. Coleman, 542 F.2d 11, 14-15 (3d Cir.1976). No such situation exists here.

Plaintiffs claim the stretch of track where the train derailed presents a particularly local safety hazard because the rail was worn, second-hand, 100-pound mainline track. For purposes of this Opinion, the Court accepts plaintiffs' assertion that this substandard light-weight track becomes especially brittle in North Dakota's extreme winter cold. Plaintiffs then add the fact of heavy rail traffic near Minot. Putting them all together, plaintiffs claim these factors spell a safety concern unique to the local area. The Court is not persuaded.

These factors do not present a safety hazard impossible to regulate on a national level. Plaintiffs' version of a "local safety hazard" devolves into a claim that 65 miles of inadequate rail satisfies the test. But substandard rail is not unique to North Dakota, and the fact that too-light rail becomes brittle when cold is not to be equated with an essentially local concern. Inadequate rail, wherever it is found, is a national safety concern amenable to national regulation. Thousands of miles of such track must exist in cold weather areas.

Plaintiffs do not claim the national regulations are incapable of addressing the safety issues concerning the stretch of track near Minot. They actually assert the polar opposite: "Plaintiffs' negligence claims are predominantly based on [CP Rail's] failure to obey federal regulations." (Pl.'s Br. 39.) Plaintiffs seek to "merely enforce standards with which [CP Rail] already must comply." *Id.* The fact that plaintiffs' claims are almost entirely premised on CP Rail's violation of federal regulations undermines their assertion that these issues cannot be adequately ad-

dressed within the national standards. Thus, there is no "essentially local safety hazard" in need of additional state regulation. *See* 49 U.S.C. § 20106. Plaintiffs' negligence claims simply cannot stand.

III. *Conclusion*

The Court finds plaintiffs' complaint is preempted by the FRSA. For this reason, defendants' motion is granted. Accordingly, this matter is dismissed with prejudice.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

ADDENDUM

Related Cases

04-3221 John Salling v. Canadian Pacific Railway Company

04-3222 Dion Darveaux v. Canadian Pacific Railway Company

04-3223 Larry Schafer v. Canadian Pacific Railway Company

04-3224 Gerald Wickman v. Canadian Pacific Railway Company

04-3225 Charles Swenson v. Canadian Pacific Railway Company

04-3282 Rebecca Behnkie v. Canadian Pacific Railway Company

04-3283 Marilyn Carlson v. Canadian Pacific Railway Company

04-3284 Larry Crabbe v. Canadian Pacific Railway Company

04-3286 Wilfred Dahly v. Canadian Pacific Railway Company

04-3287 Denise Duchsherer v. Canadian Pacific Railway Company

04-3288 Judy Deutsch v. Canadian Pacific Railway Company

04-3290 Jo Ann Flick v. Canadian Pacific Railway Company

04-3291 Leo Gleason v. Canadian Pacific Railway Company

04-3292 Charlotte Goerndt v. Canadian Pacific Railway Company

04-3293 May Beth Gross v. Canadian Pacific Railway Company

04-3294 Darla M. Just v. Canadian Pacific Railway Company

04-3295 Irene Clore Korgel v. Canadian Pacific Railway Company

04-3296 Richard McBride v. Canadian Pacific Railway Company

04-3297 Richard Muhlbradt v. Canadian Pacific Railway Company

04-3298 Lonnie Shigley v. Canadian Pacific Railway Company

04-3299 Bobby Smith v. Canadian Pacific Railway Company

04-3300 Rachelle Todosichuk v. Canadian Pacific Railway Company

04-3301 Shelly Hingst v. Canadian Pacific Railway Company

04-3303 Nathan Freeman v. Canadian Pacific Railway Company

04-3304 Doug Weltzin v. Canadian Pacific Railway Company

04-3305 Melissa Todd v. Canadian Pacific Railway Company

04-3306 Ray Lakoduk v. Canadian Pacific Railway Company

04-3307 Trent Westmeyer v. Canadian Pacific Railway Company

04-3309 LeRoy Slorby v. Canadian Pacific Railway Company

04-3311 Mark Nisbet v. Canadian Pacific Railway Company

APPENDIX G

49 U.S.C. § 20106

(a) *National uniformity of regulation.*—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) *Clarification regarding State law causes of action.*—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Home-

land Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

No. 08-871

In the Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

TOM LUNDEEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the application of a statutory amendment to cases that were pending on appeal when the amendment was enacted violates the separation of powers principles associated with *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

2. Whether the application of a statutory amendment to cases that were pending on appeal when the amendment was enacted violates the separation of powers principles associated with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 532 F.3d 682. The opinion of the district court (Pet. App. 81a-102a) is reported at 507 F. Supp. 2d 1006.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2008. A petition for rehearing was denied on October 10, 2008 (Pet. App. 42a-60a). The petition for a writ of certiorari was filed on January 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 18, 2002, a freight train owned and operated by petitioners derailed near Minot, North Dakota. As a result of the derailment, more than 220,000 gallons of anhydrous ammonia were released into the air. Pet. App. 8a, 82a.

2. a. Respondents and others filed suit against petitioners in Minnesota state court. Petitioners removed the actions filed by respondents to federal district court. Respondents filed a motion to remand the cases to state court. The district court denied that motion, holding that a reference to "United States law" in respondents' complaints had alleged a federal cause of action and thus created a basis for federal subject matter jurisdiction. Pet. App. 8a-9a; 342 F. Supp. 2d 826 (D. Minn. 2004)

After the district court denied their motion to remand, respondents sought and were granted permission to amend their complaints to delete the reference to "United States law." The district court then granted respondents' renewed motions to remand their cases to state court. Pet. App. 9a; 2005 WL 563111 (D. Minn. Mar. 9, 2005). The court concluded that the complaints no longer pleaded any federal causes of action and that continuing to exercise supplemental jurisdiction over respondents' remaining state law claims "would be inappropriate" under the circumstances. 2005 WL 563111, at *2; see *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988).

b. Petitioners appealed the district court's remand order, and the court of appeals reversed and remanded to the district court for further proceedings. Pet. App. 61a-78a (*Lundeen I*). In that decision, the court of appeals held that respondents' state law claims regarding negligent track inspection were completely preempted

by the Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C. 20101 *et seq.* Pet. App. 78a. As a result, the court of appeals concluded that any claims for negligent track maintenance were necessarily federal in nature and that "[t]he district court * * * has subject-matter jurisdiction in the instant case." *Ibid.* The court of appeals "remanded [to the district court] for proceedings consistent with this opinion." *Ibid.*

c. Respondents filed a petition for rehearing en banc. The court of appeals denied that petition, with two judges stating that they would have granted it. Pet. App. 79a. Respondents filed a petition for a writ of certiorari (No. 06-528), which this Court denied. *Id.* at 80a.

3. When the cases were returned to the district court, petitioners filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The district court granted that motion. Pet. App. 81a-102a. The court concluded that all of respondents' state law claims failed as a matter of law because they were "preempted by the FRSA" and because federal law did not provide respondents with a cause of action. *Id.* at 100a.

4. Respondents appealed the district court's dismissal of their amended complaints to the court of appeals. Pet. App. 7a. On August 3, 2007, while respondents' appeals were pending, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (2007 Act), Pub. L. No. 110-53, 121 Stat. 266. Section 1528 of the 2007 Act, 121 Stat. 453 (2007 Amendment), amended the preemption provision of the FRSA by adding two new subsections (Subsec-

tions (b) and (c)) to 49 U.S.C. 20106 (2000 & Supp. V 2005).[1]

Subsection (b) is captioned "Clarification Regarding State Law Causes of Action." 2007 Act § 1528, 121 Stat. 453. Subsection (b)(1) provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage" based on a failure to comply with certain enumerated standards of care. 49 U.S.C. 20106(b)(1). Subsection (b)(2) provides that "[t]his subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002," 49 U.S.C. 20106(b)(2), the date of the Minot derailment. Subsection (c) is captioned "Jurisdiction." It states that "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." 49 U.S.C. 20106(c).

With leave of the court of appeals, the parties filed supplemental briefs addressing the impact of the 2007 Amendment on respondents' pending appeals. Pet. App. 11a. In their supplemental brief, petitioners argued that the 2007 Amendment is unconstitutional for a variety of reasons, Pet. C.A. Supp. Br. 11-59, 61-67, although they did not argue that it directs the reopening of final judgments as prohibited by *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). See Pet. C.A. Supp. Br. 27 n.9. The United States intervened and filed a brief defending the constitutionality of the 2007 Amendment. Pet. App. 11a; see 28 U.S.C. 517, 2403(a).

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[1] All citations of 49 U.S.C. 20106(b) and (c) are to the statute as it will be codified in Supplement I (2007) of the United States Code.

5. a. The court of appeals held that the 2007 Amendment is constitutional, vacated its earlier decision in *Lundeen I*, and remanded the cases to the district court with directions to remand them to state court. Pet. App. 1a-41a. The court of appeals rejected petitioners' contention that the 2007 Amendment violates separation of powers principles. The court stated that "Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases," and that "the separation of powers doctrine is violated only when Congress tries to apply new law to cases which have already reached a final judgment." *Id.* at 12a (citing *Plaut*, 514 U.S. at 218, 226). The court of appeals determined that Congress had not violated that principle here "because when the amendment became effective these cases were on appeal and had not reached final judgments." *Id.* at 13a. The court also rejected petitioners' argument that Congress's reference to the 2007 amendment "as a '[c]larification' of existing law somehow alters our analysis." *Ibid.* (brackets in original). The court of appeals stated that it was "obliged to apply the amendment to pending cases regardless of the label Congress attached to it," and it noted that "[t]he statute's clear language indicates that state law causes of action are no longer preempted under § 20106." *Ibid.*[2]

b. Judge Beam dissented. Pet. App. 18a-41a. In his view, "the jurisdictional finding of *Lundeen I* was a final

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[2] The court of appeals also rejected petitioners' arguments that the application of the 2007 Amendment to these cases violated the Due Process Clause (Pet. App. 13a-15a), the equal protection component of the Due Process Clause (*id.* at 16a-17a), and the Ex Post Facto Clause (*id.* at 17a). Petitioners do not renew those claims before this Court.

judgment that cannot constitutionally be reopened or reversed by Congress or this court." *Id.* at 37a-38a.[3]

6. Petitioners filed petitions for rehearing by the panel and for rehearing en banc. The court of appeals denied those petitions. Judge Beam dissented. Pet. App. 42a-60a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. In any event, this petition for a writ of certiorari would not be an appropriate vehicle for considering petitioners' constitutional claims. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 11-12) that the application of the 2007 Amendment to these cases violates the separation-of-powers principles set forth in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In *Plaut*, this Court considered whether amendments to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, could constitutionally revive a suit in which the plaintiffs' claims had been dismissed, final judgment had been en-

[3] Judge Beam also concluded that, as a statutory matter, respondents' state law claims were still preempted notwithstanding the enactment of the 2007 Amendment, Pet. App. 26a-36a, and that "none of the issues decided by [the district court] or this panel in *Lundeen I* are reached by the language of" the 2007 Amendment, *id.* at 37a.

Petitioners have not sought further review of the court of appeals' decision based on any of the statutory grounds identified by Judge Beam, see Pet. i, and their assertion in a one-sentence footnote that the constitutional issues upon which they do seek review "could be avoided by construing the statute narrowly," Pet. 11 n.2, is insufficient to preserve any statutory questions for this Court's review. In any event, petitioners do not even directly assert that the court of appeals' statutory analysis is incorrect, much less that it conflicts with any decision of this Court or of another court of appeals.

tered, and the time for appeal had expired. See 514 U.S. at 214. Because the new statute "retroactively command[ed] the federal courts to reopen final judgments" —that is, judgments that "conclusively resolve[d] the case"—this Court held that Congress had exercised authority reserved for the Judiciary, in violation of the separation of powers. *Id.* at 219 (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

a. The court of appeals correctly held that the application of the 2007 Amendment to these cases does not violate *Plaut*. Section 20106(b)(2) expressly provides that "[t]his subsection shall apply to *all pending* State law causes of action arising from events or activities occurring on or after January 18, 2002." 49 U.SC. 20106(b)(2) (emphasis added). No final judgments had been entered in respondents' suits when the 2007 Amendment was enacted; to the contrary, those suits were pending on appeal at the time. As the court of appeals correctly explained, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." Pet. App. 12a (quoting *Plaut*, 514 U.S. at 226); cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576 (2006) (noting that this Court has "applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed") (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994)).

Petitioners assert that the Eighth Circuit's "jurisdictional determination" (Pet. 12) in *Lundeen I* constituted a "final judgment" (Pet. 11) within the meaning of *Plaut*. That contention is without merit. Although "[f]inality is

variously defined," *Clay* v. *United States*, 537 U.S. 522, 527 (2003), *Plaut* makes clear that there has been no final judgment for separation-of-powers purposes until the entire "case[]" or "suit[]" has been "*finally* dismissed," 514 U.S. at 217; see *id.* at 225 ("When retroactive legislation requires its own application in a *case* already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'") (emphasis added; citation omitted). In fact, *Plaut* specifically identified "suits still pending on appeal" as a situation in which there has *not* yet been a final judgment. *Id.* at 217.

Petitioners assert that this Court's denial of a writ of certiorari in connection with petitioners' previous interlocutory appeal rendered the court of appeals' jurisdictional holding in *Lundeen I* "the final word of the judicial department." Pet. 12 n.4; see Pet. 11-12. But this Court has explained that its denial of a petition for a writ of certiorari at an interlocutory stage of a case does not even conclusively resolve any discrete question of law. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916) (characterizing the contrary position as "based on an erroneous view" of the Court's certiorari jurisdiction); Eugene Gressman et al., *Supreme Court Practice* 283 (9th ed. 2007) (Gressman) ("Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment.") (citing cases). Neither the Eighth Circuit's interlocutory ruling in *Lundeen I* nor this Court's subsequent denial of certiorari expressed "the final word of the [judicial] department as a whole" with respect to these cases. *Plaut*, 514 U.S. at 227. To the contrary, because federal courts have a continuing and independ-

ent obligation to satisfy themselves that they and any lower courts possess subject matter jurisdiction, see, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998), a court's initial holding that it possesses jurisdiction over a particular action cannot be deemed "final" until the case has been resolved in its entirety and a final judgment has been entered.

b. Petitioners have failed to demonstrate that the court of appeals' decision in this case conflicts with a decision of any other court of appeals. Petitioners rely most prominently on *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998). See Pet. 13. *Vazquez-Rivera*, however, was a criminal prosecution, and it involved an ex post facto challenge to an amended sentencing statute, not a separation-of-powers challenge to an amended jurisdictional statute, which is what this case involves. See 135 F.3d at 177 ("[T]here should be little doubt that the application of the provisions of the Carjacking Correction Act to appellant * * * violates the ex post facto clause of the Constitution."). As the court of appeals correctly explained, the Ex Post Facto Clause "applies only in the criminal context." Pet. App. 17a.

Petitioners quote (Pet. 13) language in *Vazquez-Rivera* in which the First Circuit declined to revisit its earlier interpretation of the pre-amendment statute on the ground that Congress's "labeling [of] the * * * amendment as a 'clarification' of Congress's intent in the original law [was] legally irrelevant." 135 F.3d at 177.[4]

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[4] As petitioners correctly note (see Pet. 13), the *Vazquez-Rivera* panel cited *Plaut* in support of this proposition, and it also stated that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." *Vazquez-Rivera*, 135 F.3d at 177. But the *Vazquez-Rivera* panel did not

There is no conflict between that statement and the court of appeals' decision in this case. The court of appeals did not hold that the 2007 Amendment required it to alter its previous view about the correct interpretation of the pre-2007 law, and it expressly declined to attach any significance to Congress's decision to label the 2007 Amendment a "[c]larification." Pet. App. 13a (brackets in original). Instead, the court of appeals held that the 2007 Amendment meant that "state law causes of action are *no longer preempted* under § 20106." *Ibid.* (emphasis added).

There is likewise no conflict (see Pet. 13-14) between the court of appeals' decision in this case and decisions of other courts of appeals stating that Congress lacks the power to alter the result in completed cases simply because certain collateral proceedings persist. As explained above, the present appeals are not "a collateral attack upon an adverse judgment." *Insurance Corp. of Ir.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982). Instead, they are a *continuation* of the primary litigation that was previously the subject of an interlocutory appeal in *Lundeen I*.[5]

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elaborate further on that latter statement, and it ultimately *upheld* the imposition of an enhanced sentence under the pre-enactment statute. *Id.* at 177-178. As a result, the First Circuit's abbreviated reasoning on this score, which was not essential to its holding, does not contradict the court of appeals' decision in this case, let alone furnish adequate ground for this Court's review.

[5] In fact, petitioners cite cases (see Pet. 14) that expressly recognize that Congress *may* amend the rules that govern pending litigation, and that Congress may do so even "after [the pre-amended rules] have been applied in a case," so long as the amendment is promulgated "before final judgment has been entered." *United States* v. *Enjady*, 134 F.3d 1427, 1429-1430 (10th Cir.) (quoting *Plaut*, 514 U.S. at 229), cert. denied, 525 U.S. 887 (1998); see *ibid.* (applying amended version of Fed-

2. Petitioners also contend (Pet. 16-26) that the application of the 2007 Amendment in these cases conflicts with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). In *Klein*, the administrator of a Confederate sympathizer's estate sued to recover for property seized during the Civil War, based on legislation authorizing payment to owners who proved that they had not aided the rebellion. *Id.* at 136, 138-139, 142-143. This Court had previously held that a Presidential pardon (which the decedent had received) satisfied that burden of proof. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). After Klein prevailed in the Court of Claims, however, Congress enacted a statute providing that a pardon would instead be taken as proof that an individual had aided the Confederacy and eliminating federal jurisdiction over such claims. *Klein*, 80 U.S. (13 Wall.) at 143-144. This Court held that the statute was unconstitutional, stating that the legislation had improperly attempted to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

a. The court of appeals' decision in this case is fully consistent with *Klein*. As this Court has explained, *Klein* relied on a combination of factors to hold Congress's enactment unconstitutional, including the fact that Congress had assured a favorable result for the

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eral Rule of Evidence 413 on appeal, even though the court of appeals had held in a previous appeal that the pre-amendment version did not permit the introduction of certain evidence and the defendant's trial had occurred before the amended version of the Rule took effect); accord *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1042 (5th Cir. 1997) (stating that courts must apply new amendments "in reviewing judgments still on appeal that were rendered before the law was enacted") (quoting *Plaut*, 514 U.S. at 226).

government in all cases and had infringed upon the President's pardon power. *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980). Those factors are not present here.

Even assuming that *Klein* retains some force in situations that do not involve either of the two factors mentioned above, moreover, this Court has made clear that *Klein* does not apply when Congress "amend[s] applicable law" or "set[s] out substantive legal standards for the Judiciary to apply." *Plaut*, 514 U.S. at 218 (first set of brackets in original) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). The 2007 Amendment alters the FRSA in a manner that sets out substantive standards. The new statute enumerates specific categories of suits that may proceed in state court, notwithstanding certain statutory principles of federal preemption in the field of railroad safety. In particular, new Subsection (b)(1) sets forth a limited class of duties and types of recovery, and provides that "[n]othing in this section shall be construed to preempt an action under State law" meeting those criteria. 49 U.S.C. 20106(b)(1). That standard applies to all causes of action accruing after the statute's effective date, see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2428 (2006), as well as all "pending State law causes of action" that arise from events "occurring on or after January 18, 2002," 42 U.S.C. 20106(b)(2).

The 2007 Amendment does not require any particular findings or results in cases to which it applies. It expresses no position on whether respondents in this case (or any other plaintiffs) have stated a cause of action for breach of any of the duties listed in Subsection (b), and thus whether their claims avoid preemption. Rather, the 2007 Amendment establishes a standard that governs

current and future railway tort suits; it elaborates particular duties of care and classes of injury and provides that state lawsuits involving those duties and injuries may proceed without federal preemption. The statute does not "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate," *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995), but instead provides a general standard under which railroad safety suits may be judged by the courts in particular cases.

Petitioners err in contending (Pet. 18-19, 25-26) that the 2007 Amendment violates the principles identified in *Klein* because the heading that Congress chose for new Subsection (b) contains the word "[c]larification." Congress's choice of that word likely reflects nothing more than the fact that, before the 2007 Amendment, federal courts had disagreed about whether the FRSA preempted only state law standards of care or also state law remedies. Compare Pet. App. 61a-78a (holding the latter), with *Michael* v. *Norfolk S. Ry.*, 74 F.3d 271, 273 (11th Cir. 1996) (holding the former).[6] In any event, as the court of appeals correctly explained, "the label Congress attache[s] to" a particular piece of legislation is

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[6] Petitioners assert that this Court has "construed" Section 20106 to preempt not just state tort law, but all state law causes of action addressing the "'same subject matter'" as that "'cover[ed]' by federal regulations and not within the scope of the savings provision." Pet. 3 n.1 (brackets in original) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664-665 (1993) (*CSX*)). That is incorrect. *CSX* held that the pre-2007 Amendment version of Section 20106 preempted state tort law that would impose duties of care beyond those imposed by federal regulation. This Court has never passed upon whether plaintiffs may bring state claims for violations of a duty of care imposed by federal regulations. See *CSX*, 507 U.S. at 671; *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 357 (2000).

simply not controlling in assessing that legislation's substantive effect or its constitutionality. Pet. App. 13a. "Congress, of course, has the power to amend a statute that it believes [the courts] have misconstrued." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 (1994); see *Lane* v. *Pena*, 518 U.S. 187, 212 n.15 (1996) (Stevens, J., dissenting) ("In recent years Congress has enacted numerous pieces of legislation designed to override statutory opinions of this Court."). Congress did so here by codifying the Eleventh Circuit's interpretation and providing that it would govern all pending and future cases.[7]

b. Petitioners have failed to demonstrate that the court of appeals' rejection of their *Klein* claim conflicts with a decision of any other court of appeals. The courts of appeals have repeatedly rejected *Klein*-based challenges to statutes (like the 2007 Amendment) in which Congress has amended applicable law and set forth a new substantive standard for the judiciary to apply. See *Green* v. *French*, 143 F.3d 865 (4th Cir. 1998) (rejecting *Klein*-based challenge to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-332, 110 Stat. 1214), cert. denied, 525 U.S. 1090 (1999); *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc) (same), rev'd on other grounds, 521 U.S. 320 (1997); see also Pet. 20-21 (discussing *Green* and *Lindh*). Petitioners fail to cite a single case in which a federal court has relied upon

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[7] Petitioners err in assserting (Pet. 18) that Congress "disclaim[ed] any intent to change the text or meaning of § 20106." Congress added two entirely new subsections of text, and it provided that, regardless of what the statute had previously meant, "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." 49 U.S.C. 20106(c).

Klein to invalidate a federal statute—much less a case in which a federal court has relied upon *Klein* to declare unconstitutional the particular statute that is actually before the Court here.[8]

3. Even assuming that the constitutional claims raised by petitioners would otherwise merit this Court's review (and they do not), there are also at least two reasons why this petition for a writ of certiorari would not present an appropriate vehicle for considering them.

a. The core of petitioners' argument to this Court is that the 2007 Amendment is unconstitutional because it required the court of appeals to vacate its interlocutory decision in *Lundeen I*. It is far from clear, however, that the Eighth Circuit possessed appellate jurisdiction to render that decision in the first place. Cf. *Steel Co.*, 523 U.S. at 95 ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause

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[8] The various dissenting opinions in the courts of appeals on which petitioners rely (see Pet. 24-25) do not merit this Court's review.

Petitioners also suggest (Pet. 21-23) that this case "provides an unusually good vehicle" to resolve a "related circuit split" over the weight to be given clarifying amendments in interpreting prior legislation. Any such split, however, is not implicated here. Issues about the proper weight to be accorded to clarifying legislation arise when a court is being asked to interpret a party's rights under the *prior* version of a statute in light of *subsequent* legislation. That was the situation involved in all of the cases cited in the relevant portions of pages 22 and 23 of the petition for a writ of certiorari. In this case, however, the court of appeals did not revise its interpretation of the *pre*-2007-Amendment statute in light of the 2007 Amendment. To the contrary, it viewed the 2007 Amendment as establishing that "state law causes of action *are no longer preempted*." Pet. App. 13a (emphasis added).

under review.") (internal quotation marks and citation omitted).[9]

As explained previously, the order of the district court that was appealed in *Lundeen I* had held that respondents' amended complaints asserted no federal claims and had remanded the remaining state law claims to state court pursuant to the district court's discretion under *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988). See 2005 WL 563111, at *2. Section 1447(d) of Title 28, United States Code, however, provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[10] 28 U.S.C. 1447(d). The Eighth Circuit's decision in *Lundeen I* made no mention of Section 1447(d), which bars appellate review whenever a district court "relie[s] upon a ground that is colorably characterized as subject-matter jurisdiction." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418 (2007).

This Court has "never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of" Section 1447(d), and it has described the matter as "far from clear." *Powerex Corp.*, 127 S. Ct. at 2416. On

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[9] Even assuming that the court of appeals had appellate jurisdiction in *Lundeen I*, moreover, it is far from clear that *Lundeen I*'s complete preemption holding—which formed the basis for the court of appeals' conclusion that the district court had federal question jurisdiction even after the amendments to the complaints—was itself correct. Cf. *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 698 (2006) ("If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear.").

[10] Section 1447(d) exempts from this general rule "an order remanding a case to the State court from which it was removed pursuant to [28 U.S.C. 1443]." 28 U.S.C. 1447(d). These cases, however, were removed pursuant to 28 U.S.C. 1441. See 342 F. Supp. 2d at 828.

February 24, 2009, the Court heard oral argument in *Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, No. 07-1437, which presents the question whether a *Cohill* remand "is properly held to be a remand for a 'lack of subject matter jurisdiction' under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d)." Pet. Br. at i, *Carlsbad Tech, Inc.*, *supra* (No. 07-1437). If the Court answers that question "yes," the Eighth Circuit's decision in *Lundeen I* would have been issued without subject matter jurisdiction and petitioners' constitutional objections (which are founded on that decision) would be fatally compromised.

b. There is an additional reason why the Court should decline to grant review. We have been advised that state court proceedings in the remanded cases are currently ongoing, that the parties are actively engaged in discovery, that the majority of the actions pending at the time of the court of appeals' decision have since been resolved and dismissed, and that trial in the remaining suits is set for early 2010. The state court is an "equally competent body" to adjudicate petitioners' preemption defense under the FRSA, and "any claim of error on that point can be considered on review by this Court." *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 646, 648 (2006); accord *Board of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Gressman 280.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009

125 (3)

No. 08-871

FILED

APR 8 - 2009

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

v.

TOM LUNDEEN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TOM LUNDEEN, ET AL.

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QUESTIONS PRESENTED

1. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), provides that courts must apply statutory amendments "in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Id.* at 226. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), explains that when a jurisdiction-stripping amendment is enacted while a case is pending, the amendment applies, even if "jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The question presented here is: When a case is pending on direct appeal and Supreme Court review of a prior interlocutory decision regarding federal question jurisdiction is still available, must the court of appeals apply a new amendment providing that there is no federal question jurisdiction?

2. This Court has held that separation of powers concerns under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), are not implicated when an amendment "set[s] out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively)." *Plaut*, 514 U.S. at 218. The question presented here is: Does an amendment that sets out substantive legal standards for the Judiciary to apply regarding whether a federal statute preempts certain state-law actions and confers federal question jurisdiction violate the *Klein* doctrine?

PARTIES TO THE PROCEEDINGS

Petitioners are as stated in the Petition, and are sometimes referred to herein collectively as "Canadian Pacific."

Of the Respondents named in the Petition, a number of them have reached a settlement with Petitioners and no longer have pending actions: Larry and Carol Crabbe; Leo and Denise Duchsherer; Leo Gleason; Ray Lakoduk; Tom and Nanette Lundeen, individually and on behalf of M.L. and M.L., minors; Bobby and Mary Smith; and Melissa Todd.

The following named Respondents still have pending actions: Mary Beth Gross, individually and on behalf of B.G., a minor; JoAnn Flick; and Rachelle Todosichuk. In addition, an action by Mark and Sandra Nisbet is currently pending, but the parties have reached a settlement agreement and have filed a stipulation of dismissal with the court.

The United States of America, having intervened in this action in the court of appeals to defend the constitutionality of the 2007 amendments to 49 U.S.C. § 20106, is a respondent in this Court pursuant to Rule 12.6.

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STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

BRIEF IN OPPOSITION

Respondents respectfully request that the petition for a writ of certiorari be denied.

OPINIONS BELOW

In addition to the decisions identified in the Petition, Respondents refer the Court to the district court's prior decision of March 9, 2005, declining supplemental jurisdiction and remanding these cases back to state court. It was from this unreported decision, reproduced herein at Resp. App. 1, that Canadian Pacific appealed, leading to the *Lundeen I* decision.

Respondents also refer the Court to the district court's order of December 1, 2008, remanding the cases back to state court following issuance of the mandate from the *Lundeen II* decision that is the subject of the Petition. That order is also unreported and is reproduced at Resp. App. 12.

INTRODUCTION

While these cases were pending on direct appeal, Congress amended the statute at issue to state in plain language that there is no federal question jurisdiction in cases such as these. Although a prior interlocutory decision of the court of appeals had inferred federal question jurisdiction in the absence of

that language, that decision was not, by its very nature, final under *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), or any other authority. Amendments regarding jurisdiction are routinely applied to pending cases pursuant to well-settled law, including *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Plaut,* which itself also explained that amendments setting substantive legal standards for the courts to apply do not conflict with this Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

The court of appeals correctly held that the amendments to 49 U.S.C. § 20106 are constitutional. The court also correctly held that when a civil action is on appeal and Congress amends the law as to federal question jurisdiction applicable to that action, appellate courts must apply the law, as amended, to the case at hand. The decision below is consistent with this Court's precedent and decisions of the other courts of appeals. Further review is not warranted.

STATEMENT OF THE CASE

On January 18, 2002, a Canadian Pacific train catastrophically derailed near Minot, North Dakota, on track owned and maintained by Petitioner Soo Line Railroad Company ("Soo Line"), a wholly owned subsidiary of Petitioner Canadian Pacific Railway Company. More than 220,000 gallons of anhydrous ammonia were released from tank cars on the train,

forming a large toxic cloud that hung over the City of Minot. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 687 (8th Cir. 2008) ("*Lundeen II*") (Pet. App. 8a). Many people, including Respondents, were exposed to the anhydrous ammonia and, as a result, now suffer from serious and permanent respiratory diseases and eye damage. *Id.*

The complaints known as the "*Lundeen*" cases were filed on June 28, 2004, in Hennepin County state court, in Minneapolis, Minnesota, where Soo Line resides. Numerous other individual plaintiffs who were injured as a result of the derailment also filed actions in that court. *In re Soo Line R.R. Co. Derailment of Jan. 18, 2002*, 2006 WL 1153359, at *1 (Minn. D. Ct. Apr. 24, 2006).

Substantial litigation occurred in Hennepin County Court. Discovery proceeded, various pretrial motions and interlocutory appeals were decided, and certain cases were scheduled for trial. Shortly before each trial, Petitioners (collectively "Canadian Pacific") admitted liability for the cases to be tried, contesting only damages. *Id.* at *2-3. Some cases proceeded through trial to jury verdicts, others settled shortly before trial, and still others awaited their trial dates. *Id.*

Meanwhile, Canadian Pacific removed the *Lundeen* cases from Hennepin County Court to federal court. The federal district court found that, in making a reference to "United States law" while stating their claims, the *Lundeen* plaintiffs had alleged a federal

cause of action, thus creating federal question jurisdiction. *Lundeen v. Canadian Pac. Ry. Co.*, 342 F. Supp. 2d 826, 829-31 (D. Minn. 2004). Because the plaintiffs had not intended to plead a federal cause of action, they moved to amend their complaints to remove the reference to United States law. That motion was granted. *Lundeen v. Canadian Pac. Ry. Co.*, 2005 WL 563111, at *1 (D. Minn. Mar. 9, 2005) (Resp. App. 4).

In the same March 9, 2005, order, the district court further granted a motion to remand the *Lundeen* cases back to state court, where, as noted, other cases arising out of the same derailment were proceeding. *Id.* at 5-6. The court declined to exercise supplemental federal jurisdiction over these cases. *Id.* at 6-7.

Canadian Pacific appealed the district court's remand order, arguing forum shopping and urging that the district court abused its discretion in refusing to exercise supplemental jurisdiction.[1] Canadian Pacific did not raise "complete preemption" as a basis for federal question jurisdiction; it had in fact expressly argued to the district court that its removal was not based on the complete preemption doctrine. (Def.'s Opp'n to Mot. to Remand, p. 6.) After oral

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[1] This Court heard oral arguments on February 24, 2009, in the matter of *Carlsbad Tech., Inc. v. HIF BIO*, No. 07-1437, on the issue of whether a remand order based on a declination of supplemental jurisdiction is subject to appeal. *See* 28 U.S.C. § 1447(c) and (d).

argument, however, the Eighth Circuit *sua sponte* raised the issue of potential federal jurisdiction under the "complete preemption" doctrine and requested additional briefing from the parties.

The Eighth Circuit ruled that there was implied federal question jurisdiction over at least one of the Lundeens' claims (a claim based on negligent inspection), based on the doctrine of "complete preemption." Specifically, the panel concluded that the Lundeens' negligent inspection claim was substantively preempted under 49 U.S.C. § 20106 of the Federal Railway Safety Act of 1970 ("FRSA"), and, because the regulations at issue did not contain a savings clause indicating the Federal Railway Agency meant to leave open a state-law cause of action, the panel determined that "absent en banc review we are bound by our decision in [*Peters v. Union Pac. R.R.*, 80 F.3d 257 (8th Cir. 1996)] to find complete, jurisdictional, preemption." *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 614-15 (8th Cir. 2006) ("*Lundeen I*") (Pet. App. 78a). The cases were remanded to the federal district court for further proceedings on the basis of that jurisdiction. *Id.*

The Lundeens sought en banc review. While two of the three *Lundeen I* panel members, including the author of that decision, voted to grant the petition, it was ultimately denied. The Lundeens then petitioned this Court for a writ of certiorari, on the basis that *Lundeen I* was in conflict with the law of nine other circuits that have held that, regardless of how broad substantive preemption may or may not be, the

jurisdictional doctrine of "complete preemption" requires a determination that the federal statute creates a federal cause of action, which § 20106 does not. *See* Petition for Writ of Certiorari in *Lundeen v. Canadian Pacific Railway Company*, No. 06-528. That interlocutory petition was denied. Pet. App. 80a.

Following remand, Canadian Pacific moved the federal district court for entry of a final judgment on the pleadings under Fed. R. Civ. P. 12(c), arguing that all of the Lundeens' claims were preempted under § 20106 because of the track regulations found in 49 C.F.R. pt. 213. The Lundeens opposed, arguing that this Court has held that § 20106 displays "considerable solicitude for state law," courts must be "reluctant to find preemption" under § 20106, and preemption will not lie unless it is the "clear and manifest purpose of Congress." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-65 (1993). Further, since this Court has held that to preempt a state-law standard, a regulation under the FRSA must "substantially subsume" the subject matter of the state requirement, *id.* at 664, the Lundeens argued that had not occurred here regarding the particular claims at issue.[2] The Lundeens also argued that even where

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[2] Contrary to Canadian Pacific's statement that *Lundeen I* was "in accord" with *Easterwood* and *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000), (Pet. 18), it was not. Neither *Easterwood* nor *Shanklin* even dealt with federal jurisdiction based on complete preemption, and as to the substantive preemption defense, those decisions set forth and applied a narrow and

(Continued on following page)

federal standards do substantially subsume an area, a state-law action for damages based on violations of those federal standards is not preempted, citing, *inter alia*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451-52 (2005). Nonetheless, following Canadian Pacific's argument that broad preemption under the FRSA is the law in the Eighth Circuit, the district court granted Canadian Pacific's motion and entered final judgment dismissing all claims. *Lundeen v. Canadian Pac. Ry. Co.*, 507 F. Supp. 2d 1006, 1017 (D. Minn. 2007). The Lundeens appealed.

While the briefing for the appeal was under way, Congress enacted and President Bush signed into law an amendment to § 20106, adding what is now codified as subsections (b) and (c) to the statute. The pre-amended § 20106 is now codified as subsection (a) of the statute. As amended, § 20106 now provides:

> **§ 20106. Preemption**
>
> (a) NATIONAL UNIFORMITY OF REGULATION. – (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary

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stringent standard under the FRSA. *See generally* 529 U.S. at 358-59; 507 U.S. at 673-75.

of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order –

> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

(b) CLARIFICATION REGARDING STATE LAW CAUSES OF ACTION. – (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –

> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering

> the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.
>
> (c) JURISDICTION – Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

Because § 20106, as amended in subsection (c), expressly provides that "[n]othing in this section . . . confers Federal question jurisdiction for such State law causes of action," the Lundeens filed a motion asking the court of appeals to apply the amended statute to these cases, find a lack of federal jurisdiction, and remand these cases with instructions that they be remanded back to state court. The Eighth Circuit ordered additional briefing from both parties on the effect of the amendment.

In that briefing, Canadian Pacific challenged the constitutionality of the new amendment on numerous

grounds, including Due Process, Equal Protection, Separation of Powers, and the Ex Post Facto Clause (only one of which – Separation of Powers – is urged in the Petition). The United States intervened and defended the constitutionality of Congress's amendment to § 20106, and the Lundeens also argued the amendment was constitutional and applies to these pending cases.

The Eighth Circuit held in *Lundeen II* that the amendment was constitutional. Applying the plain language of § 20106(c), the court held there was no federal question jurisdiction over these cases. Accordingly, it vacated its decision in *Lundeen I* and remanded the cases to the federal district court, with instructions to further remand the cases back to Minnesota state court, where they had originally been filed. Senior Judge C. Arlen Beam dissented.

Canadian Pacific filed a petition for rehearing and rehearing en banc, and the full court denied review. Although Senior Judge Beam again dissented, no active judge on the Eighth Circuit joined in the dissent.

Canadian Pacific filed a motion with the Eighth Circuit to stay the mandate pending a petition for writ of certiorari to this Court. The Eighth Circuit denied that motion, again with only Judge Beam dissenting. No motion was made to this Court for a stay, and the mandate issued.

Upon remand, the federal district court remanded the cases back to the Hennepin County state

court. After the nearly five-year detour in federal court, discovery is now proceeding, and the first trials are set for early 2010.[3]

In the time since the Eighth Circuit denied Canadian Pacific's petition for rehearing en banc, Canadian Pacific has settled with the plaintiffs in all but three of the *Lundeen* actions.[4]

REASONS FOR DENYING THE PETITION

As fully set forth below, the constitutional questions the Petition purports to raise have already been well-aired and conclusively decided by this Court. The Petition presents nothing new with regard to those questions, except to attempt to raise them again in a setting of very narrow application. Indeed, in order to appear new, the Petition resorts to a partial quote from this Court's *Plaut* decision, eliding crucial passages, and to simply ignoring well-settled aspects of this

[3] Additional cases that are not in the *Lundeen* group and are not the subject of the Petition, but which had been removed to federal court by Canadian Pacific based on the *Lundeen I* decision, were also remanded back to state court after the Eighth Circuit ruled in *Lundeen II*. *E.g.*, *Ahmann v. Canadian Pac. Ry. Co.*, No. 08-cv-89 (D. Minn. Dec. 1, 2008). Those remands for lack of subject matter jurisdiction are not subject to appeal. 28 U.S.C. § 1447(c) & (d); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) ("[R]emands based on grounds specified in § 1447(c) are immune from review under § 1447(d).").

[4] *See* "Parties to the Proceedings," *supra*, p. ii.

Court's jurisdiction and practice. Beyond that, the Petition attempts to invoke a conflict around the edges of a unique decision made in 1871, *United States v. Klein*, that this Court has not held applicable to invalidate an act of Congress even once in the almost 140 years since then. The Petition attempts to do so, not by reference to any decision involving the Federal Railway Safety Act in question here, but instead by invoking inapposite cases ranging from AEDPA to Terri Schiavo.

The underlying controversy here involves an attempt by victims of a catastrophic railroad derailment to obtain some redress by asserting state-law claims for personal injury damages based on the violation of state-law negligence standards where no federal standard applies, and, where federally imposed standards do apply, based on the violation of those federal standards. Although the issue of whether the *Lundeen I* panel correctly decided that there was federal jurisdiction based on complete preemption under the old version of § 20106 is not directly at issue here (because *Lundeen II* applied the new amendment to these cases), a very brief word concerning that issue shows the background against which Congress and the court of appeals acted:

Congress passed the FRSA in 1970. *Easterwood*, 507 U.S. at 661. Despite all the cases interpreting the FRSA since then, including two by this Court,[5] no

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[5] *Shanklin*, 529 U.S. 344; *Easterwood*, 507 U.S. 658.

appellate court – other than the Eighth Circuit – has ever held that the FRSA's preemption provision, 49 U.S.C. § 20106, creates federal question jurisdiction through the doctrine of "complete preemption." Indeed, this Court has only found three statutes that support complete preemption, and the FRSA is not one of them.[6] In its 2007 amendments to § 20106, Congress made clear that the FRSA is indeed not one of them, expressly providing that § 20106 creates no federal cause of action and no federal question jurisdiction. In light of that amendment, the Eighth Circuit then applied the law, as amended, to the cases pending before it. The result is that the law on "complete preemption" federal jurisdiction under the FRSA is now uniform across the circuits. The *Lundeen II* decision of the Eighth Circuit did not create any conflict; if anything, it eliminated one.

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[6] As a matter of settled law, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (emphasis in original); *accord Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). When, however, a federal statute provides an "exclusive cause of action," a claim alleged under state law "necessarily arises under federal law and the case is removable" under the complete preemption doctrine. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). This Court has identified only three federal statutes where such complete preemption exists: section 301 of the Labor Management Relations Act ("LMRA"), *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968); sections 85 and 86 of the National Bank Act, *Beneficial, supra*; and section 502 of the Employee Retirement Income Security Act ("ERISA"), *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987).

I. THERE IS NO CONFLICT PRESENTED HERE

A. The *Lundeen II* decision creates no conflict regarding the amendment to § 20106.

Lundeen II applied the plain language of a 2007 amendment to the preemption provision of the FRSA, codified at 49 U.S.C. § 20106. As applicable here, that amendment added a provision regarding federal question jurisdiction, § 20106(c), which states in its entirety: "Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." There are no conflicting decisions concerning the application of that amendment, nor does the Petition cite to any such conflict.

B. The *Lundeen II* decision will not likely conflict in the future with the holdings of other courts of appeals as to the application of § 20106.

Lundeen II held that, if constitutional, § 20106(c), which states explicitly that § 20106 does not confer federal question jurisdiction, effectively overrules the court's prior interlocutory decision in *Lundeen I*, which had found federal question jurisdiction based on the language of what is now § 20106(a) when that language stood alone. Pet. App. 11a ("[I]f valid, subsection (c) of § 20106 effectively overrules our decision in *Lundeen I*."). Finding that Congress did not violate

the Constitution in enacting this amendment, *Lundeen II* vacated *Lundeen I* and sent these pending cases back to district court with directions to remand them to the state court from whence they had been removed. *Id.* at 17a-18a.

The issue regarding the effect of § 20106(c) on pending cases[7] is extremely unlikely to arise again in any court, for two reasons: (1) at the time the amendment was enacted, there appear to have been no other federal circuits where a pending action for damages alleged under state law had been removed to federal court based on alleged federal question jurisdiction under § 20106;[8] and (2) all the pending

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[7] The Petition presents no question regarding the application of § 20106(c) to cases filed after its enactment.

[8] Indeed, the Eighth Circuit's *Lundeen I* decision was unique among the circuits in holding that a federal statute such as § 20106, which creates no federal cause of action, could provide the basis for federal question jurisdiction under the "complete preemption" doctrine. *See, e.g., Sullivan v. Am. Airlines*, 424 F.3d 267, 273-76 (2d Cir. 2005) (state-law claim not removable because no federal cause of action replacing plaintiff's state claims); *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) ("[T]he sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district courts.") (emphasis in original); *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1157 n.9 (10th Cir. 2004) ("a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted cause of action") (quotations and citation omitted); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative.") (internal quotes and cites omitted). *See also* Pet. for Cert. in *Lundeen I*, No. 06-528, and additional cases cited therein.

cases arising from the Minot Derailment were filed within the Eighth Circuit. Of the plaintiffs in the *Lundeen* actions themselves, Canadian Pacific has now settled with all but three. *See* n.4, *supra*.

C. The *Lundeen II* decision creates no conflict with *Plaut* or the cases that have followed *Plaut*.

1. There is no conflict with this Court's decision in *Plaut*.

The alleged conflict with *Plaut* offered by Canadian Pacific is based on a false premise: that the decision of *Lundeen I* inferring the existence of federal question jurisdiction through the doctrine of "complete preemption" was a "final" decision within the meaning of *Plaut*. That argument ignores both what this Court actually held in *Plaut* and this Court's standard practice regarding the exercise of its certiorari jurisdiction.

With regard to *Plaut*, the ellipses tell the tale: When Canadian Pacific provides the Court an extended quote from *Plaut* at pages 10-11 of the Petition, it elides the crucial language. Below is the full quote from *Plaut*, with the words of this Court that Canadian Pacific excluded from the Petition presented in underscoring:

> [A] distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in

> what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy*, *supra*, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

Plaut, 514 U.S. at 227 (underscoring added) (italics in original).

Thus, "finality" in the *Plaut* sense occurs only when "a judicial decision becomes the last word of the judicial department with regard to a particular case." The "judicial department" is "composed of inferior Courts and one supreme Court," and the decision of an inferior court that is still subject to being appealed to the Supreme Court "is not . . . the final word of the department as a whole." *Id.*; *see also Miller v. French*, 530 U.S. 327, 347 (2000) (holding that a remedial injunction subject to continuing supervisory

jurisdiction of the courts was not "the last word of the judicial department" under *Plaut*, even if appeals have been exhausted, because the judicial department was still involved).

As its omission of the critical language in *Plaut* reveals, Canadian Pacific understands that its entire argument falls apart unless it can convince this Court that the *Lundeen I* decision of the court of appeals was "the final word of the department as a whole." It plainly was not, either in general or with regard to the question of "complete preemption" jurisdiction.

Lundeen I was an interlocutory decision. The court of appeals inferred federal question jurisdiction through § 20106 and remanded the case back to federal district court. The federal district court on remand then held that all claims were preempted, and entered a judgment of dismissal. That decision was *pending* before the Eighth Circuit on a *direct appeal* when President Bush signed the amendments to § 20106 into law, including § 20106(c). Thus, these cases were "pending" and *Lundeen I* was not a "final" decision.

It is of course the duty of all federal courts, including federal appellate courts, to address a lack of subject matter jurisdiction and to deny jurisdiction where it is not supported. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). When a jurisdiction-stripping amendment is enacted while a case is pending, the amended statute applies, even if "jurisdiction lay when the underlying

conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. The Eighth Circuit thus acted properly and in accord with well-settled law when it vacated its earlier decision, which had found jurisdiction in these cases, and remanded the cases with instructions that the cases be further remanded to state court. *Plaut,* 514 U.S. at 226-27; *Landgraf*, 511 U.S. at 274. The Petition ignores that general law, under which there is no conflict with *Plaut.*

The Petition also ignores both this Court's jurisdiction and its regular practice with regard to whether *Lundeen I* was the "final word of the judicial department as a whole" concerning the specific question of "complete preemption" jurisdiction in this case.

As this Court has long held, when its review is sought from a final judgment, it can correct errors made in a previous lower court decision in the same case, even if the Court previously denied certiorari review of that very decision. The leading treatise puts it this way, citing several of this Court's cases:

> Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court. The Court can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success. *See . . . Toledo Scale*

> *Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see also United States v. Virginia*, 518 U.S. 515, 526, 558 (1996); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

E. Gressman, et al., *Supreme Court Practice* 82-83 (9th ed. 2007). A prior denial of certiorari in this context does "not establish the law of the case or amount to res judicata on the points raised." *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Indeed, the Court has often noted that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting denial). "Our action [denying a petition for writ of certiorari] does not, of course, preclude [a party] from raising the same issues in a later petition, after final judgment has been rendered." *Id.*

Thus, under this Court's normal practice and understanding of its jurisdiction, its denial of certiorari in *Lundeen I* was not the final word of the judicial department as a whole, even with regard to

the question of complete preemption jurisdiction at issue there.[9] No conflict with *Plaut* is presented.

To support its flawed argument of a conflict with *Plaut*, Canadian Pacific erroneously cites cases that involve subsequent collateral attacks to jurisdictional determinations in prior, closed litigation. *See Ins. Corp. of Ir., Ltd.*, 456 U.S. at 702 n.9 (noting that while courts, including appellate courts, must address a lack of subject matter jurisdiction in existing litigation, the principles of *res judicata* prevent a collateral attack to reopen the question after that litigation has closed); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931) (holding that a party cannot collaterally attack a final judgment, contesting personal jurisdiction, in a new, second lawsuit). These cases do not address the finality of an earlier subject matter jurisdiction determination in a still-pending lawsuit, and they are inapposite here.[10]

When *Plaut* is read in full, and when this Court's normal certiorari practice and the law regarding subject matter jurisdiction are considered, it is clear

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[9] Indeed, if certiorari is granted here in *Lundeen II*, Respondents will urge as alternative grounds for affirmance the arguments they made in their petition in No. 06-528, that *Lundeen I* was wrongly decided, and that § 20106(a), even standing alone as it did then, does not provide "complete preemption" federal jurisdiction.

[10] Similarly, none of the cases cited in footnote 3 on page 12 of the Petition concerns the effect of a subject matter jurisdiction determination when a case is still pending on direct appeal.

the decision below does not raise a separation of powers concern under *Plaut*, and that no conflict with *Plaut* is presented.

Indeed, Congress carefully followed the law of this Court in amending § 20106. For example, Congress limited its retroactive amendment in subsection (b), a substantive provision regarding the defense of preemption, to *pending* state-law causes of action, thus following *Plaut*. 49 U.S.C. § 20106(b)(2); *see Plaut*, 514 U.S. at 225-27. Likewise, Congress expressly stated its intent regarding the retroactivity of that substantive provision, thus following *Landgraf*. 49 U.S.C. § 20106(b)(2); *see Landgraf*, 511 U.S. at 272-73. While Congress did not state anything regarding the temporal application of subsection (c), the jurisdictional provision, such language is not necessary where, as here, only one jurisdictional provision is involved. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (explaining the presumption that intervening statutes ousting jurisdiction apply to pending cases);[11] *Landgraf*, 511 U.S. at 274 ("We have

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[11] After reconfirming the general rule, the Court in *Hamdan* declined to apply it in the unique circumstances of that case, where Congress had made changes to three sequential jurisdictional provisions regarding habeas claims made by detainees at Guantanamo Bay, explicitly providing for two of the provisions to apply to pending cases but remaining silent as to the effect of the third. The Court drew a "negative inference" from Congress's silence on the third provision because of the inclusion of explicit language in the other two jurisdictional provisions. 548 U.S. at 578-84.

(Continued on following page)

regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."). As this Court explained in *Landgraf*, the application of a jurisdictional amendment to pending cases is proper, "[e]ven absent specific legislative authorization." 511 U.S. at 273. "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.* at 274 (internal quotation and citation omitted); *see also Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (distinguishing application of jurisdictional amendments to pending cases from retroactive application of substantive provisions, and applying an amendment ousting jurisdiction to pending cases).

Thus, Congress followed the directives of this Court in enacting the amendments to 49 U.S.C.

The unique circumstances of *Hamdan* are not present here. Section 20106 contains only one jurisdictional provision, § 20106(c); there is no other jurisdictional provision from which to draw a negative inference contrary to the general rule. Canadian Pacific argued below that the explicit reference to pending cases in § 20106(b) provides the conflicting language, but that argument is incorrect. Section 20106(b) is a substantive provision subject to different standards regarding the need for express retroactive language, *see Landgraf*, 511 U.S. at 272-74, and thus is not comparable to 20106(c). Further, § 20106(b) actually provides an additional reason that complete preemption, as previously analyzed by the Eighth Circuit, fails, because it expressly eliminates the defense of preemption for claims such as these.

§ 20106, and the Eighth Circuit properly applied the new subsection (c) of that statute to these pending cases, in accordance with *Plaut* and *Landgraf*.

2. There is no conflict with other circuits on *Plaut* either.

Nor does *Lundeen II* create a conflict with other circuits regarding *Plaut*. Canadian Pacific erroneously argues that other circuits have held "that *Plaut* applies to *judgments*, not entire cases." (Pet. 13.) The cases Canadian Pacific cites do not support its characterization of a split in the circuits.

Canadian Pacific highlights the First Circuit's opinion in *United States v. Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998), as its lead case. But *Vazquez-Rivera* is an Ex Post Facto Clause case. At the heart of *Vazquez-Rivera* was whether an Ex Post Facto challenge to a change in criminal law could be defeated by labeling the amendment as a clarification. *See id.* at 177. The First Circuit held that, regardless of the label, the amendment did change the law, and to apply it retrospectively (on a remand for resentencing) would violate the Ex Post Facto Clause. *Id.* ("[T]here should be little doubt that the application of the provisions of the Carjacking Correction Act to appellant for the crime for which he was convicted violates the ex post facto clause of the Constitution."). The court simply cited *Plaut* in dicta, stating that it would not change its interpretation of the original criminal statute based on a subsequent "clarification"

that had in fact changed the law. *Id.* Because of the limitations of the Ex Post Facto Clause, the court applied the pre-amendment version of the statute, as originally interpreted by the court. *Id.* Significantly, the court never cited *Plaut* to argue, as Canadian Pacific does here, that the amendment itself was unconstitutional under the separation of powers doctrine. *Vazquez-Rivera* is plainly inapposite to *Lundeen II*.

Canadian Pacific also cites to the Fifth Circuit opinion in *Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034 (5th Cir. 1997), where the court denied a motion to reopen a final decision of the Board of Immigration Appeals in a habeas proceeding. *Id.* at 1038, 1042-43. *Plaut's* applicability to a collateral review on a habeas petition is a completely different legal issue than whether the "final word of the judicial department" has been rendered when a civil action is still pending on direct appeal. Indeed, the court in *Hernandez-Rodriguez* articulated this distinction, stating:

> [U]nquestionably the judiciary must generally apply changes in the law to cases pending on appeal, and "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly," . . .

Id. at 1042 (quoting *Plaut,* 514 U.S. at 226, and citing *Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429,

439-41 (1992) and *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)).

Next, Canadian Pacific cites a Fourth Circuit decision, *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996). There, the court found that a consent decree subject to the ongoing supervision of the district court "remains subject to subsequent changes in the law." *Id.* at 371. The *Plyler* decision is consistent with this Court's teachings, *see Plaut,* 514 U.S. at 225-27; *Miller*, 530 U.S. at 347, and presents no conflict with *Lundeen II.*

Similarly, the Tenth Circuit cases that Canadian Pacific cites apply *Plaut* in a manner consistent with the other circuits' application and *Lundeen II. See United States v. Enjady*, 134 F.3d 1427, 1429-30 (10th Cir. 1998) (holding that a new evidentiary rule applied to a pending trial because "[r]ules of pleading and proof can [] be altered after the cause of action arises, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered") (quoting *Plaut* and citing *Landgraf*); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1223 (10th Cir. 1996) (explaining that because the case had not "completed [its] journey through the federal courts" at the time an amendment was enacted, there had been no "final" judgment under *Plaut*).

In short, the decisions that Canadian Pacific cites are consistent with each other in recognizing that cases still subject to direct judicial review or still under court supervision are "pending" for purposes of

separation of powers analysis under *Plaut*. These decisions do not conflict with each other or with *Lundeen II*.

D. The *Lundeen II* decision creates no conflict with *Klein*, or with other circuit cases concerning *Klein*.

1. There is no conflict with *Klein*.

Next, Canadian Pacific seeks review under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, "the executor [Klein] of the estate of a Confederate sympathizer[ ] sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion." *Miller*, 530 U.S. at 348. This Court had held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869), that a presidential pardon satisfied the statutory burden of proof that no aid had been given. Congress then passed a statute requiring courts to consider such a pardon to be conclusive proof of *dis*loyalty, and so to rule for the government. The Court held that "it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration." *Klein*, 80 U.S. at 148. It also rejected the attempt by Congress to make the courts complicit in that endeavor, noting that "[w]e are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted," *id.* at 146, and stating that whether Congress can so direct a

court "because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor" is a "question [which] seems to us to answer itself," *id.* at 147.[12]

This Court has already made clear that there is no conflict with *Klein* in the circumstances present here. "Whatever the precise scope of *Klein*, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law'" as opposed to merely directing the disposition of a case under existing law. *Plaut*, 514 U.S. at 218 (citing *Robertson*, 503 U.S. at 441, which held that even when a statutory amendment is directed to particular pending cases, it does not violate separation of powers principles if Congress leaves the application of that amendment to the courts).[13] Thus, in *Plaut,* where an amendment was enacted to overrule a judicial statutory interpretation, this Court recognized that the legislation "indisputably does set out substantive legal standards for the Judiciary to

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[12] As this Court has since explained, "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor" was "of obvious importance to the *Klein* holding." *United States v. Sioux Nation*, 448 U.S. 371, 405 (1980).

[13] Indeed, the *Klein* Court itself had foreshadowed that clarification, distinguishing a situation in which an act had changed the law "but the court was left to apply its ordinary rules to the new circumstances created by the act." 80 U.S. at 146-47.

apply" and therefore "changes the law (even if solely retroactively)." *Id.*

The amendments here clearly set out substantive legal standards that were not previously part of the text of the law. Congress added section 20106(b), which sets out the standard to apply in deciding whether § 20106 preempts certain state-law actions for damages. The law previously did not contain that explicit standard. Congress thought (and said) it was clarifying what should have been implicit in the previous text of § 20106(a) alone, but there is no doubt that Congress changed the law by providing an explicit standard for the judiciary to apply as to state-law actions for damages. And, as noted above, Congress carefully followed this Court's decision in *Plaut* by expressly making that standard applicable only to pending and future cases; it did not try to change the law with regard to cases that had already been decided by the final word of the judicial department. Congress also added subsection (c), explicitly stating, for the first time, that nothing in the entirety of § 20106 creates a federal cause of action or confers any federal question jurisdiction. Congress thus gave the judiciary explicit standards to use when deciding questions of preemption, of implied federal causes of action, and of implied federal question jurisdiction, all of which turn on the judiciary's reading of the intent of Congress, which Congress here made explicit by amending the text of the law.

Thus, as in *Plaut* and *Robertson*, Congress here clearly amended the law and left the application of that law to the courts. There is no conflict with *Klein*.

2. There is no conflict as to the application of *Klein*.

Canadian Pacific's attempt to create the impression of a circuit split as to the application of the *Klein* doctrine also fails. Canadian Pacific erroneously argues that *Lundeen II* and decisions by the Ninth, Second, Tenth, and D.C. Circuits hold that "Congress can direct the outcome of particular pending cases as long as that result is achieved through legislative enactment." (Pet. 19-20.) Neither *Lundeen II* nor the other circuits Canadian Pacific lists stand for that proposition.

In fact, the cases Canadian Pacific cites do nothing more than reiterate this Court's holdings in *Robertson* and *Plaut* that the separation of powers doctrine at issue in *Klein* is not offended when Congress amends applicable law. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 904 (9th Cir. 1994) (rejecting a *Klein* argument and holding that the statutory amendment at issue "compel[s] changes in law, not findings or results under old law"); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008), *cert. denied*, 77 U.S.L.W. 3267 (U.S. Mar. 9, 2009) (No. 08-530) (finding that *Klein* did not render a statutory amendment unconstitutional because the amendment "changes the applicable law");

Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1164 & n.8 (10th Cir. 2004) (reasoning that because Congress had changed the law, the court "need not decide whether directing specific actions without changing the law would be an unconstitutional attempt by Congress to usurp the Executive's role in interpreting the law"); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (rejecting a *Klein* argument because, as in *Robertson*, the statute at issue "amends the applicable substantive law").

The circuits that Canadian Pacific alleges represent the "other side," (Pet. 20-21) – the Fourth and Seventh Circuits – actually use the same reasoning as the cases cited above. *Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998) (explaining that separation of powers was not implicated by amendment because it did not "dictate[ ] the judiciary's interpretation of governing law" and did not "mandate[ ] a particular result in any pending case"), *abrogated in part on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000); *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (explaining that separation of powers is not offended under *Klein* when Congress makes rules that affect an entire class of cases).[14] If there were any

[14] In describing *Lindh v. Murphy*, Canadian Pacific again employs the tactic of elision. The full quote from this decision clearly reflects that the Seventh Circuit is in accord with the remaining circuits' view that the Constitution is not offended under *Klein* when Congress amends a law. Below is the entire passage, with the language that Canadian Pacific omits underscored:

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doubt about the law of these circuits, additional decisions plainly demonstrate their understanding that when an amendment changes the law, *Klein* is not implicated. *See City of Chicago v. United States Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 783-84 (7th Cir. 2005) (finding it "unnecessary to address the City's *Klein* challenge" because the amendment at issue had changed the law); *Plyler*, 100 F.3d at 372 (Fourth Circuit explaining that because Congress amended the law in limiting the district court's authority to award relief, the amendment did not violate the *Klein* doctrine).

Notably, in every case cited by Canadian Pacific, the legislation at issue was deemed constitutional and not in violation of the *Klein* separation of powers doctrine. Likewise, the amendment at issue in *Lundeen II* was found constitutional; it changed the applicable law by setting forth Congress's express

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> Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases. Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages. It may establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed – even if that turns out to deprive the victim of compensation.

Lindh, 96 F.3d at 872 (internal citations omitted). In any event, this Court later reversed the Seventh Circuit's decision, on other grounds. 521 U.S. 320 (1997).

intent regarding federal question jurisdiction and preemption, and left the application of that changed law to the courts. In short, there is no circuit conflict at issue here regarding *Klein*.

3. If there is any conflict in the circuits regarding the weight of clarification amendments, this case is not part of that conflict.

Recognizing that separation of powers concerns under *Klein* are not offended when "Congress . . . change[s] substantive law so as to affect pending cases," (Pet. 17-18), Canadian Pacific attempts to argue that the amendments did not substantively change the meaning of the statute, because subsection (b) of § 20106 is entitled "Clarification Regarding State Law Causes of Action."

The argument is a red herring. As an initial matter, the subtitle regarding a "clarification" applies only to subsection (b), not to subsection (c), the jurisdictional provision that was actually applied in *Lundeen II*. Subsection (c) clearly makes new law in that it expressly addresses issues to which Congress had not spoken in the past, providing that § 20106 does not create a federal cause of action or confer federal question jurisdiction. Further, even as to

subsection (b) and regardless of its label,[15] Congress amended and changed § 20106 by stating, for the first time, its express intent as to the standard for determining whether state-law actions for damages are preempted. As this Court held in *Robertson* and *Plaut*, such amendments do not violate the separation of powers under *Klein*. *Plaut*, 514 U.S. at 218.

Because Congress changed the law in expressly setting forth new statutory standards, the alleged split heralded by Canadian Pacific regarding the amount of weight to accord clarification provisions is not at issue here. In fact, in *Lundeen II*, the Eighth Circuit explained *Plaut's* teachings that Congress has constitutional power to amend statutory law even if such amendments will affect pending cases, and that courts are obligated to apply the law, as amended, to the pending cases. This explanation and reliance on *Plaut* indicates the Eighth Circuit's understanding that the law had indeed changed under § 20106. Further, the court went on to address Canadian Pacific's other constitutional challenges to the amendments to 49 U.S.C. § 20106, an analysis it need not have undertaken if the court had believed the amendment was a clarification that did not change the law and, as such, did not implicate potential constitutional concerns. Thus, while Canadian Pacific makes much of the scholarly debate regarding the

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[15] "To be sure, a subchapter heading cannot substitute for the operative text of the statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 2336 (2008).

weight to give clarification amendments, such analysis is not implicated by either the Eighth Circuit's finding that changes to § 20106 do not violate *Klein* principles or the court's application of a new jurisdiction-stripping amendment to pending cases.

Notably, none of the cases Canadian Pacific cites regarding an alleged split on how much weight should be given to clarification amendments involves amendments conferring or stripping jurisdiction. That is because jurisdictional amendments apply to pending cases, and the question of whether they change the law or merely clarify it is a moot point. *See Landgraf*, 511 U.S. at 274 (citing *Bruner*, 343 U.S. at 116-17). Here, the specific amendment applied in *Lundeen II* was § 20106(c), a jurisdictional amendment. Accordingly, the question of how much weight to give clarification statutes is not at issue. Said another way, even if there is a split in the circuits, this case is not a good vehicle for determining the weight to give to clarification amendments.

II. IN ADDITION TO THE LACK OF ANY CONFLICT, OTHER CONSIDERATIONS ALSO COUNSEL AGAINST REVIEW

Finally, Canadian Pacific marshals a broad set of cases, dealing with everything from AEDPA to Terri Schiavo, to support an argument that this Court should explore and define the parameters of *Klein*, even alleging that *Klein* must be addressed because of due process concerns. Notably missing from the

Petition is any decision (other than *Lundeen II* itself) dealing with the 2007 amendments to § 20106 of the FRSA. While the theoretical edges of *Klein* may inspire an interesting debate, they are not at issue here, and *Lundeen II* would be a poor vehicle for exploring them.

Further, any potential due process concerns of retroactivity that Canadian Pacific alleges animate *Klein* (a separation of powers case), (Pet. 25), are not in play here. The amendment applied in *Lundeen II* is subsection (c), which states that § 20106 does not confer federal question jurisdiction. As this Court recently explained in *Hamdan v. Rumsfeld*, an amendment like subsection (c) that eliminates potential federal question jurisdiction "takes away no substantive right but simply changes the tribunal that is to hear the case." 548 U.S. at 577 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). "[N]o retroactivity problem arises because the change in the law does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* (quoting *Landgraf*, 511 U.S. at 280). Accordingly, *Lundeen II* does not implicate any potential due process concerns.[16]

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[16] Although the panel dissent speculates at length about the topic, the *Lundeen II* court did not rule on the merits of any defense of preemption under § 20106, as amended; it simply held that the federal courts lack subject matter jurisdiction, leaving the merits of any preemption defense to the state court on

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These cases involve plaintiffs who were seriously injured in a derailment on January 18, 2002, caused by what Canadian Pacific has admitted in other cases was its negligence. Their state court lawsuits were detoured by an interlocutory decision finding "complete preemption," which the Eighth Circuit inferred from the preemption clause of 49 U.S.C. § 20106. The decision in *Lundeen II* does nothing more than apply to pending cases the plain language of a statutory amendment stating there is no federal question jurisdiction in such actions for damages, and then return those cases back to state court, where they will now finally proceed on the merits.[17] *Lundeen II* is in

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remand. *See also Bates v. Missouri & N. Ark. R.R. Co.*, 548 F.3d 634, 637 (8th Cir. 2008) (noting that "*Lundeen II* makes clear that the FRSA does not convert a state law claim into a federal cause of action. . . . [a]bsent diversity, therefore, a state court is the proper forum for litigating . . . preemption defense[s]"). In vacating *Lundeen I*, the decision in *Lundeen II* mirrored the standard order given by appellate courts upon a finding that there is no federal jurisdiction. *Compare Lundeen II*, Pet. App. 17a-18a ("we vacate our decision in *Lundeen I* and remand these cases to the district court with instructions in turn to further remand them to state court"), *with, e.g., Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594, 601 (7th Cir. 2008) ("We reverse the denial of the motion to remand and vacate the order dismissing the claims as the trial court lacked jurisdiction to enter that order. Upon return of this case to the district court, it is to be remanded to the state court from which it was removed.").

[17] To the extent preemption is asserted in the state court litigation on the merits, this Court has explained that state courts are "equally competent" to make merits decisions on issues such as " 'a claim of federal pre-emption, [and] that decision may ultimately be reviewed on appeal by this Court.' "

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accordance with the settled law of this Court and other circuits, and is not a decision worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 8, 2009

Respectfully submitted,

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Kircher v. Putnam Funds Trust, 547 U.S. 633, 646, 648 (2006) (quoting *Franchise Tax Bd.*, 463 U.S. at 12 n.12).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, individually, and Nanette Lundeen, individually, and Tom Lundeen and Nanette Lundeen on behalf of, and as parents and natural guardians of [Name Of Minor Child Omitted], a minor, and Michael Lundeen,

Plaintiffs,

v.

Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company,

Defendants.

Civ. No. 04-3220 (RHK/AJB)

MEMORANDUM OPINION AND ORDER

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Timothy R. Thornton, Scott G. Knudson, and Kevin M. Decker, Briggs and Morgan, Minneapolis, Minnesota, for Defendants.

Introduction

This case (and thirty other "related" cases[1]) arises out of injuries sustained by the release of liquefied anhydrous ammonia after a train derailment in North Dakota. Before the Court is plaintiffs' second remand motion. For the reasons set forth below, the Court will grant the motion.

Background

Plaintiffs in this case are Tom and Nanette Lundeen, both individually and on behalf of [Name Of Minor Child Omitted] and Michael Lundeen (collectively, the "Lundeens"). Defendants are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company (collectively, "CPR").

In June 2004, the Lundeens sued CPR in Minnesota state court. Among their original claims, they alleged that "CPR violated applicable state law . . . *as well as United States law,* resulting in the release of hazardous substances and which amount to contamination, pollution, unauthorized release of hazardous material and other violations of applicable 'environmental laws'. . . ." (Compl. Count Three ¶ V (emphasis added).)

In July 2004, CPR removed the case to this Court based upon federal question jurisdiction pursuant to

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[1] *See* Exhibit A (attached).

28 U.S.C. § 1441(a) and (b).[2] In August 2004, the Lundeens filed their first remand motion on the ground that no federal question jurisdiction existed. This Court denied that motion, finding that the face of the complaint – specifically, the reference to "United States law" – stated a federal question. *Lundeen v. Canadian Pacific Ry. Co.*, 342 F. Supp. 2d 826, 829 (D. Minn. 2004).[3]

In November 2004, the Lundeens moved to amend their complaint to delete the federal claim and, in the alternative, to voluntarily dismiss that claim. (*See* Doc. Nos. 26, 29.) At the same time, they filed a motion, conditioned upon amendment of the

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[2] Section 1441(a) provides, in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

Section 1441(b) provides, in relevant part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

[3] The Lundeens declined to amend their Complaint at that time – even though the Court's inquiry of counsel should have made it abundantly clear that a request would have been granted.

complaint or voluntary dismissal of the federal claim, to remand to state court. (*See* Doc. No. 33.)

In January 2005, Magistrate Judge Boylan granted the Lundeens' motion to amend and determined that the motion to dismiss was moot. (Doc. No. 54.) CPR sought reimbursement for expenses incurred in opposing the Lundeens' motions, which it estimated at $5,000. (*Id.*) Considering that only the motions to amend and dismiss were pending before him, while the second remand motion was before the undersigned, Magistrate Judge Boylan ordered the Lundeens (and another moving party) to pay CPR a total of $2,000. (*Id.*)

In February 2005, the Lundeens filed an Amended Complaint. (Doc. No. 55.) The reference to "United States law," which had formed the basis for federal question jurisdiction, was deleted. The Court now considers the Lundeens' second remand motion.

Analysis

The Lundeens argue that this case should be remanded to state court because the federal claim has been deleted and only state-law claims remain. In *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 348 (1988), the Supreme Court considered whether a district court has discretion to remand a removed case to state court "when all federal-law claims have dropped out of the action and only pendant state-law claims remain." The plaintiffs in *Cohill* filed suit in state court alleging violations of state and federal

age-discrimination laws, as well as state common-law claims. *Id.* at 345. Defendants removed on the basis of federal question jurisdiction. *Id.* Six months later, the plaintiffs moved to amend their complaint to delete the federal claim and moved to remand. *Id.* at 346. After granting the motion to amend, the district court remanded the action to state court. *Id.* The Supreme Court held that "a district court has discretion to remand to state court a removed case involving pendant claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." *Id.* at 357. In exercising discretion to remand, district courts are to consider "the principles of economy, convenience, fairness, and comity." *Id.*

Under these principles, the Court finds that retaining jurisdiction over this case would be inappropriate. First, this case is in its initial stages and a remand would waste little judicial resources: no scheduling orders have been issued, no discovery has been conducted, and no trial date has been set. Second, it is not inconvenient or unfair for CPR to litigate this matter in state court. Presently, CPR is defending cases in state court that arise out of the same train derailment. *See e.g., Allende v. Soo Line R.R. Co., et al.,* Civ. No. 03-3093 (D. Minn. Jan. 29, 2004) (Report and Recommendation recommending case be remanded to state court). Finally, remand will avoid a determination of state-law claims by this Court that could conflict with state court decisions in the other derailment cases. *See Cohill,* 484 U.S. at 350-51. As noted in *Mine Workers v. Gibbs,* 383 U.S.

715, 726 (1966), upon which the *Cohill* court relied, "[n]eedless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."

CPR argues that the remand motion should be denied because the Lundeens have engaged in forum shopping. While the *Cohill* court recognized that "forum manipulation" is a factor to be considered when determining whether to remand a case, there is no "categorical prohibition" on remanding cases where the plaintiff has attempted to manipulate the forum. *Cohill*, 484 U.S. at 357. Here, the Court finds no forum manipulation has occurred that would prohibit remand. The Lundeens have explained that they had no desire to allege or pursue federal claims. Once this Court determined that they had alleged a federal claim, which was only a small portion of the original Complaint, they promptly moved to amend and remand. Moreover, to the extent that forum manipulation may have occurred, remand is still warranted given the weight of the factors pointing in favor of sending the case back to state court.

As the Supreme Court has recognized, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendant jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Id.* at 350 n.7. Here, as in *Cohill*, the balance of factors points to-

ward declining to exercise jurisdiction over the Lundeens' remaining state-law claims. Accordingly, the Court will grant the Lundeens' Motion to Remand Action.[4]

As a final matter, CPR seeks reimbursement of its costs and attorneys' fees. They argue that the Lundeens' federal claim, which has now been deleted, caused it "to research, draft, and file Notices of Removal, Notices of Filing of Removal, Opposition to Remand, Response to Motion to Remand, and Opposition to Motions to Amend or Dismiss Complaint and Remand Action." (CPR Supp. Opp'n Mem. at 4.) It fixes its costs at $4,650, which represents a $150 filing fee for each of the thirty-one removed cases. (Decker Aff. ¶ 1.) It fixes its reasonable attorneys' fees for "removing plaintiffs' case to this Court and responding to plaintiffs' two motions for remand" at $7,570. (*Id.* ¶ 5.) Thus, CPR seeks $12,220 in total

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[4] Although the Lundeens primarily rely on *Cohill* in support of their remand motion, they also cite 28 U.S.C. § 1367(c)(2) and (3) as bases for remand. Section 1367(c)(2) and (3) provide that district courts may decline to exercise supplemental jurisdiction over state-law claims where "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction" or where "the district court has dismissed all claims over which it has original jurisdiction." The Court finds that § 1367(c) provides additional support for remand. *See In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (affirming remand of removed case under § 1367(c) and *Cohill* where the plaintiff amended complaint to delete federal-law claims).

reimbursement. The Lundeens have not opposed CPR's request.

Considering the totality of the circumstances, the Court concludes that the Lundeens should reimburse CPR $3,500 for its attorneys' fees. When given the opportunity to eliminate the federal claim during the first remand motion, counsel for the Lundeens declined. His refusal to strike that claim caused CPR to litigate two otherwise unnecessary remand motions. In the Court's view, it is fair and just for the Lundeens to reimburse CPR for part of its attorneys' fees. However, it would not be fair or just to require the Lundeens to reimburse CPR for its thirty-one filing fees or for that portion of its attorneys' fees not associated with the remand motions. First, contrary to CPR's suggestion, the federal court litigation was not all for naught – it resulted in the elimination of a federal claim. Second, as exemplified by *Cohill,* there is always a risk when removing a case based on federal question jurisdiction that the complaint will be amended and the case remanded. Finally, this amount takes into account Magistrate Judge Boylan's order that the Lundeens (and another moving party) pay CPR $2,000.

Conclusion

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS ORDERED**:[5]

1. The Lundeens' Motion to Remand Action (Doc. No. 33) is **GRANTED** and this matter, and the thirty "related" actions identified in Exhibit A (attached), shall be remanded to Hennepin County District Court; and

2. The Lundeens shall reimburse CPR for reasonable attorneys' fees in the total amount of $3,500 (this is in addition to the $2,000 ordered by Magistrate Judge Boylan).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 9, 2005

s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

Exhibit A

The "related" cases are:

Salling, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3221;

Darveaux, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3222;

Schafer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3223;

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[5] As with the first remand motion, counsel have agreed that this Memorandum Opinion and Order will apply to each of the "related" cases identified in Exhibit A (attached).

Wickman v. Canadian Pacific Railway Co., et al., Civ. No. 04-3224;

Swenson, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3225;

Behnkie, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3282;

Carlson v. Canadian Pacific Railway Co., et al., Civ. No. 04-3283;

Crabbe, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3284;

Dahly, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3286;

Duchsherer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3287;

Deutsch, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3288;

Flick v. Canadian Pacific Railway Co., et al., Civ. No. 04-3290;

Gleason v. Canadian Pacific Railway Co., et al., Civ. No. 04-3291;

Goerndt v. Canadian Pacific Railway Co.. et al., Civ. No. 04-3292;

Gross, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3293;

Just v. Canadian Pacific Railway Co., et al., Civ. No. 04-3294;

Korgel v. Canadian Pacific Railway Co., et al., Civ. No. 04-3295;

McBride, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3296;

Muhlbradt v. Canadian Pacific Railway Co., et al., Civ. No. 04-3297;

Shigley v. Canadian Pacific Railway Co., et al., Civ. No. 04-3298;

Smith, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3299;

Todosichuk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3300;

Hingst v. Canadian Pacific Railway Co., et al., Civ. No. 04-3301;

Freeman, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3303;

Weltzin v. Canadian Pacific Railway Co., et al., Civ. No. 04-3304;

Todd v. Canadian Pacific Railway Co., et al., Civ. No. 04-3305;

Lakoduk v. Canadian Pacific Railway Co., et al., Civ. No. 04-3306;

Westmeyer, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3307;

Slorby v. Canadian Pacific Railway Co., et al., Civ. No. 04-3309; and

Nisbet, et al. v. Canadian Pacific Railway Co., et al., Civ. No. 04-3311.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tom Lundeen, et al.	)	04-CV-3220 (JMR/FLN)
Larry Crabbe, et al.	)	04-CV-3284 (JMR/FLN)
Denise Duchsherer, et al.	)	04-CV-3287 (JMR/FLN)
Jo Ann Flick	)	04-CV-3290 (JMR/FLN)
Leo Gleason	)	04-CV-3291 (JMR/FLN)
Mary Beth Gross, et al.	)	04-CV-3293 (JMR/FLN)
Bobby Smith, et al.	)	04-CV-3299 (JMR/FLN)
Rachelle Todosichuk	)	04-CV-3300 (JMR/FLN)
Melissa Todd	)	04-CV-3305 (JMR/FLN)
Mark Nisbet, et al.	)	04-CV-3311 (JMR/FLN)
v.	)	ORDER
Canadian Pac. Ry. Co., et al.	)	

These matters are before the Court on remand from the Eighth Circuit Court of Appeals.

In accord with the mandate issued by the Eighth Circuit on October 28, 2008, these matters are remanded to the District Court of the Fourth Judicial District, Hennepin County, Minnesota.

IT IS SO ORDERED.

Dated: December 1, 2008

s/ JAMES M. ROSENBAUM
JAMES M. ROSENBAUM
United States District Judge

RP (4)

No. 08-871

IN THE
Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY *et al.*,
Petitioners,

v.

TOM LUNDEEN *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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April 20, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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INTRODUCTION

This petition presents two important issues arising from Congress's effort to "correct" the federal courts' application of the Federal Railroad Safety Act in specific litigation. The Eighth Circuit (and this Court by denying certiorari) finally resolved one of respondents' substantive claims—for negligent track inspection—before Congress purported to "clarif[y]" the statute. The Eighth Circuit's later reliance upon the "clarification" to revisit and reverse the resolution of that claim contravenes *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and conflicts with other circuits' interpretations of *Plaut*'s "final decision" requirement. The Eighth Circuit also applied the "clarification" to reverse the initial resolution of *other* claims then on appeal even though Congress did not change the underlying law, thereby directly implicating the continued vitality of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871).

Respondents sidestep these issues by assuming the answers to the questions presented. In their view, a claim resolved by a court of appeals, even after this Court's denial of certiorari, is never final under *Plaut* if courts continue to address other claims in the case. To avoid *Klein*, respondents attribute a meaning to Congress's "clarification" that the statute cannot bear and candidly assert that *Klein* has effectively become a nullity. By assuming away the questions presented, respondents do not meaningfully address the conflicts among the courts of appeals that justify review.

ARGUMENT

A. The Decision Below Contravenes *Plaut* And Conflicts With Decisions Of Other Circuits.

1. Respondents recognize that *Plaut* would bar the Eighth Circuit's decision below, and a circuit conflict would arise, if the court of appeals' earlier decision in *Lundeen I* were "final." To avoid this result, they rely on the false premise that *Lundeen I* was "interlocutory" and the issues it addressed were still "pending on appeal" when Congress clarified FRSA § 20106. See Resp. Br. 14, 18-21; U.S. Br. 7-10. To the contrary, the particular claim addressed in *Lundeen I* had been finally decided and was no longer pending when Congress acted.

Respondents' complaint included four distinct state-law claims. *Lundeen I* considered one of those claims—negligent track inspection—and held that federal law completely preempted that cause of action. Pet. App. 76a-78a. In so holding, the court necessarily concluded that "there is, in short, no such thing as a state-law claim" for negligent inspection, federal law "wholly displaces the state-law cause of action," and thus "the exclusive cause of action for the claim asserted" must be found in federal law, if at all. *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8, 11 (2003); Pet. App. 75a-78a.

As respondents have previously recognized, *Lundeen I* finally resolved their negligent track inspection claim. In seeking this Court's review, respondents admitted that the Eighth Circuit's decision, unless reversed, would be the judiciary's final word on that claim: they conceded that FRSA provided no cause of action for negligent inspection and no state-law cause of action remained after

Lundeen I, and thus they would "have no remedy at all" for negligent inspection unless this Court granted review and reversed. Petition for Writ of Certiorari at 2, *Lundeen* v. *Canadian Pac. Ry. Co.*, No. 06-528 (filed Oct. 16, 2006). Certiorari was denied, Pet. App. 80a, and the case was remanded for consideration of respondents' remaining claims.

On remand, the district court confirmed that *Lundeen I* had finally resolved the negligent inspection claim. Respondents tried to avoid that outcome by asserting that the Eighth Circuit was "confused" and did not intend this result. Pet. App. 92a. The district court "decline[d] the invitation to sit in review of the Court of Appeals," and recognized that *Lundeen I*'s complete preemption determination "conclude[d] the inquiry" concerning negligent inspection (respondents having already conceded that they had no such claim under federal law). *Id.* at 91a-92a. In contrast, the district court separately addressed respondents' *other* claims and found them to be preempted. *Id.* at 94a-96a. The district court's ruling on these other issues was the only matter pending on appeal when Congress "clarifi[ed]" the FRSA.

As Judge Beam correctly observed, *Lundeen I*'s complete preemption holding foreclosed respondents' state-law negligent inspection claim in "a final judgment that cannot constitutionally be reopened or reversed by Congress or this court," and it was therefore not "'still on appeal' in any sense contemplated by *Plaut*." Pet. App. 37a-39a.

Respondents mistakenly rely on cases holding that this Court may "'reach back and correct errors in the interlocutory proceedings below'" upon review of a final judgment. See Resp. Br. 19-20; U.S. Br. 8. But those cases addressed clearly interim decisions like

an interlocutory order remanded for entry of a final trademark infringement decree (*Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916)); an order remanding a case for a new trial on evidentiary grounds (*Mercer* v. *Theriot*, 377 U.S. 152 (1964)); an order remanding a discrimination case for determination of remedial measures (*United States* v. *Virginia*, 518 U.S. 515 (1996)); and an interlocutory appeal of a trial verdict before consideration of damages (*Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968)). Those cases have no application when, as here, a court finally determines that a cause of action does not exist and all appeals are exhausted. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) (when a *final* judgment is denied review on certiorari, this Court is "expressly denied power to review" that earlier judgment if another aspect of the case later comes before the Court).[1]

2. The finality of *Lundeen I*'s disposition of the negligent inspection claim is fatal to respondents'

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[1] For this reason, there is also no merit to the Government's suggestion that this case presents an issue related to *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988), that will likely be addressed in *Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, No. 07-1437 (argued Feb. 24, 2009). Jurisdiction to render the final decision in *Lundeen I* is simply not at issue in this petition seeking review of *Lundeen II*. *See Plaut*, 514 U.S. at 229 ("The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves."). The Government's argument is also substantively incorrect: the district court in *Lundeen I* remanded based on *Cohill and* under 28 U.S.C. § 1367(c), Resp. App. 7 & n.4, the latter of which is not at issue in *Carlsbad*. In any event, the pendency of *Carlsbad* would be at most a reason to hold the petition in this case, not to deny it.

opposition to certiorari on the first question presented. They concede that a judgment is "final" under *Plaut* when appeals run out and the decision "'becomes the last word of the judicial department with regard to a particular case or controversy;'" Congress cannot revise a judicial determination unless it is "*pending* before the [court of appeals] on a *direct appeal*." Resp. Br. 17-18 (quoting *Plaut*, 514 U.S. at 227).[2] Respondents unsuccessfully appealed *Lundeen I*'s disposition of the negligent inspection claim directly to this Court. That claim most certainly was not pending on appeal in *Lundeen II*.

The Government, for its part, simply endorses the Eighth Circuit's reasoning and denies that a cause of action can ever become "final" for purposes of *Plaut* when the claim was part of a case that remains before the courts. U.S. Br. 8-9. This presumes an answer to the first question presented, and as such is not a reason to deny the petition. See Robert L. Stern et al., *Supreme Court Practice* 255 (8th ed. 2002). Moreover, other courts have rejected the view of the Eighth Circuit and the Government. See Pet. 13-15. The Government's advocacy for one side of that dispute simply underscores the need for this Court's review.

In any event, the Government's interpretation of *Plaut* is wrong. The Government selectively quotes snippets from *Plaut* that refer to "cases" or "suits," but *Plaut* never endorsed the notion that Congress can reverse final judicial decisions merely because

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[2] Respondents insinuate that the petition misrepresents *Plaut* by "omi[tting] ... critical language," but all the language respondents quote merely reinforces *Plaut*'s holding, made clear in the petition, that a judgment becomes final once the time to appeal has expired. *Compare* Resp. Br. 16-18, *with* Pet. 10-12.

the judiciary is still considering other issues in a case. Instead, *Plaut* shields from legislative revision those judgments that resolve "a particular case *or controversy*," and the "distinction between judgments from which all appeals have been foregone or completed and judgments that remain on appeal" is critical to *Plaut*'s constitutional analysis. 514 U.S. at 227 (emphasis added).[3]

Nor is it an answer to maintain that a federal court must continually reassess jurisdiction over ongoing litigation. See Resp. Br. 18-19; U.S. Br. 8-9. Such jurisdictional determinations are necessary for claims on direct appeal, such as the causes of action at issue in *Lundeen II*. But as respondents admit, upon entry of a final judgment on a specific claim (as with their negligent inspection claim), jurisdiction is "considered forever settled as between the parties" and cannot be reopened on collateral attack. *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-25 (1931); Resp. Br. 21. Moreover, no occasion could arise to revisit that prior determination here because jurisdiction clearly existed for *Lundeen II* by virtue of the *other* state law claims the district court deemed preempted.[4]

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[3] Congress sought to overturn pre-existing law in this case only with respect to individual "pending State law causes of action," 49 U.S.C. § 20106(b)(2), not entire lawsuits.

[4] The Government similarly contends that review is unwarranted because a state court can "adjudicate petitioners' preemption defense under the FRSA." U.S. Br. 17. This is wholly beside the point: petitioners contest the Eighth Circuit's application of Congress's "clarification," an issue independent of preemption that presents *Plaut* and *Klein* issues not before the state courts. Petitioners do not seek review on the merits of any preemption defenses.

3. Having assumed that the Eighth Circuit's disposal of the negligent inspection claim in *Lundeen I* was not final, respondents have no answer to the circuit split created by *Lundeen II*. Respondents acknowledge that, but for their assertion that "the present appeals ... are a *continuation* of the primary litigation that was previously the subject of an interlocutory appeal in *Lundeen I*," *Lundeen II* would conflict with the Fourth, Fifth, and Tenth Circuit decisions cited in the petition (at 13-15). U.S. Br. 10; Resp. Br. 25-26. Respondents' attempts to distinguish *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998), are particularly unpersuasive. The First Circuit held that when a court renders a final decision on the meaning of a federal statute (as in *Lundeen I*), a later attempt by Congress to "clarif[y]" that meaning is "legally irrelevant" under *Plaut*, even if other aspects of the case remain before the courts. *Id.* at 177. Respondents note that *Vazquez-Rivera* arose in the context of an Ex Post Facto clause challenge, Resp. Br. 24-25; U.S. Br. 9, but the First Circuit nonetheless explicitly interpreted *Plaut* to mean that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." *Vazquez-Rivera*, 135 F.3d at 177. This holding squarely conflicts with *Lundeen II*.

B. The Decision Below Is Inconsistent With *Klein* And Deepens Longstanding Conflicts Among The Courts Of Appeals.

1. Under *Klein*, Congress can only "compel[] changes in law" by substantive amendment; it may not dictate "findings or results under old law." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438, 441 (1992). Respondents contend that Congress's "clarification" of § 20106 satisfies *Klein*

because it "added two entirely new subsections of text" to the FRSA and "alters the FRSA in a manner that sets out substantive standards." U.S. Br. 12, 14 n.7; Resp. Br. 29. This argument ignores Congress's reenactment of identical substantive statutory language, and its explanation that the additional "interpretive" language was designed specifically to target this litigation and to "rectify the Federal court decisions related to the Minot, North Dakota accident" by "clarify[ing] the intent and interpretations of the existing preemption statute" *without* making "any substantive change in the meaning of the provision." H.R. Conf. Rep. No. 110-259, at 351 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 183 ("Conf. Report"); see Pet. 5-6, 18-19. "Clarify[ing]" a statute without "substantive[ly] chang[ing] the meaning of the provision" in order to overturn a particular judicial decision contravenes *Klein*.[5]

In *Robertson*, this Court noted that the constitutionality of statutes purporting to direct the outcome of a particular case without substantively changing the law's meaning is an unsettled question that it expressly left unresolved. 503 U.S. at 441. The circuits are deeply split on this point and have repeatedly asked for this Court's guidance. See Pet. 19-21, 23-25. That the courts of appeals have ultimately concluded in these cases that *Klein* is not

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[5] The Government implausibly suggests that Congress "likely" used the word "clarification" to mean a substantive amendment designed to resolve a split among the circuits, *see* U.S. Br. 13, and thus resorts to arguing that "clarification" means something different from its plain meaning and inconsistent with the statute's terms targeting this litigation. The Government also has no answer to the Conference Report and floor statements to the contrary.

violated, see U.S. Br. 14-15; Resp. Br. 32, or that these cases interpret statutes other than FRSA § 20106, see Resp. Br. 35-36, is beside the point. The relevant consideration is that the courts of appeals have articulated starkly different interpretations of *Klein*, creating a circuit split deepened by the Eighth Circuit in this case.

Contrary to respondents' assertion, the Fourth and Seventh Circuits do not "use the same reasoning" as other circuits in applying *Klein*. *Id.* at 31. The Fourth and Seventh Circuits regard *Klein* as focused not on whether Congress has legislated a new "standard," but on whether Congress has (as in this case) encroached upon "'the interpretive power of the courts'" by "dictat[ing] the judiciary's interpretation of governing law" without actually changing that law, thereby "mandat[ing] a particular result in any pending case." *Green* v. *French*, 143 F.3d 865, 874-75 (4th Cir. 1998), *abrogated in part on other grounds*, *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).[6]

Other circuits have adopted a far narrower view of *Klein* and accept any "new standard" enacted "through the legislative process." Pet. App. 12a; Pet. 19-20 (citing cases from the Second, Ninth, Tenth, and D.C. Circuits). The Eighth Circuit adopted this

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[6] Respondents err in contending that other cases in the Fourth and Seventh Circuits apply a more relaxed standard. Resp. Br. 32 (citing *City of Chicago* v. *U.S. Dep't of Treas.*, 423 F.3d 777 (7th Cir. 2005), and *Plyler* v. *Moore*, 100 F.3d 365 (4th Cir. 1996)). Those cases concluded that Congress enacted substantive amendments to the law and did not seek merely to change the outcome of a case by directing how the law must be interpreted. *See City of Chicago*, 423 F.3d at 783; *Plyler*, 100 F.3d at 372.

view in holding that *Klein* permits Congress to "clarify" § 20106, without purporting to change the statute's meaning, in order to change the outcome of this case. The Fourth and Seventh Circuits would reach a different conclusion.

2. Respondents also cannot avoid the conflict between the Eighth Circuit and other courts of appeals concerning the effect of "clarification" amendments. As explained in the petition, the Eighth Circuit treated Congress's "clarification" of § 20106 as a binding change in law, while other courts have regarded such amendments as merely advisory views of a subsequent Congress. See Pet. 21-23. In particular, the Seventh Circuit has warned that Congress's use of clarifying amendments raises serious separation of powers questions under *Klein* that call for "clarification from the Supreme Court." *Paramount Health Sys., Inc.* v. *Wright*, 138 F.3d 706, 710-11 (7th Cir. 1998).

The Government acknowledges these concerns but contends that they do not arise in this case because the Eighth Circuit did not "interpret a party's rights under the *prior* version of a statute," and instead applied the clarification as if it were a new statute. U.S. Br. 15 n.8. But that is exactly the point: the Eighth Circuit's treatment of the clarification as a binding direction to *displace* prior applications of the statute is what generates the circuit split and requires this Court's review.

The other respondents repeat the insupportable view that the "clarification" was intended substantively to change § 20106 (without citing Congress's statements to the contrary) and contend that, in any event, *Lundeen II* was based upon the jurisdictional provisions of § 20106(c), which they assert is not part of the clarification amendment.

This argument misreads both the statute and *Lundeen II*. Sections 20106(b) and (c) were enacted together as a single "clarification" of § 20106(a). See Conf. Report at 351, *reprinted in* 2007 U.S.C.C.A.N. at 183-84. Moreover, the Eighth Circuit repeatedly cited § 20106(b) and Congress's clarification of the law as its justification for reversing the district court's preemption holding. See Pet. App. 9a-10a, 12a-16a. The circuits are split over whether such a statutory clarification should be treated as binding, and nothing in respondents' brief addresses this issue.

In the end, respondents are forced to argue that *Klein* cannot be read according to its terms and is, in effect, a dead letter. See U.S. Br. 12, 14-15; Resp. Br. 30-32. Those arguments support granting the petition: if *Klein* is to be laid to rest, that decision should result from this Court's considered judgment.

CONCLUSION

For these reasons and the reasons stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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April 20, 2009

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